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Shifting the Paradigm or Shifting the Problem? The Politics of California's Criminal Justice Realignment

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SHIFTING THE PARADIGM OR SHIFTING THE PROBLEM? THE POLITICS OF CALIFORNIA'S CRIMINAL JUSTICE REALIGNMENT

Allen Hopper, James Austin, and Jolene Forman*

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INTRODUCTION

In May 2011, the U.S. Supreme Court set the stage for a potentially remarkable shift in California criminal justice policy when it upheld a federal district three-judge court¹ order in *Brown v. Plata*² requiring the State³ to significantly reduce its prison population. By the time the Supreme Court stepped in, California prisons held nearly twice as many people as they were designed to house, despite a decades-long prison construction boom.⁴ The Supreme Court ruled that this overcrowding subjects prisoners to conditions horrific enough to constitute cruel and unusual punishment prohibited by the Eighth Amendment and ordered the State to reduce its prison population to no more than 137.5 percent of design capacity.⁵ The Court gave the State

1. Under the Prison Litigation Reform Act (“PLRA”), a district court judge, before whom a prison conditions case is pending, may request the appointment of three-judge court, under 28 U.S.C.A. § 2284, if she believes that a prison release order should be considered as a remedy in the case. 18 U.S.C. § 3226(a). Only three-judge courts have the authority to issue prison release orders. *Id.* In *Plata v. Brown*, two district court cases were consolidated, and in each of those cases the respective district court judge independently requested a three-judge court be appointed. 131 S. Ct. 1910, 1921. The Chief Judge of the Court of Appeals for the Ninth Circuit convened a three-judge court as prescribed by 18 U.S.C. § 3226(a) composed of the district court judges from the two consolidated cases and a third Ninth Circuit judge. *Id.*

2. 131 S. Ct. 1910 (2011).

3. “The State” refers to the defendants in the *Plata* litigation: Governor Brown and the California Department of Corrections and Rehabilitation.

4. See SARA ABARBANEL, ET AL., REALIGNING THE REVOLVING DOOR: AN ANALYSIS OF CALIFORNIA COUNTIES’ AB 109 2011–2012 IMPLEMENTATION PLANS (2013), available at <http://www.law.stanford.edu/sites/default/files/child-page/183091/doc/slspublic/Realigning%20the%20Revolving%20Door%20with%20updates%20for%2058%20counties%20080113.pdf> (“California has had prison overcrowding issues since the inception of its prison system. The State created its prison system in 1851, and by 1858, six hundred prisoners were housed in an institution with only sixty-two cells.”) (citing Kara Dansky, *Understanding California Sentencing*, 43 U.S.F. L. REV. 45, 52–53 (2008)); see also Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 331 (2011); CAL. DEP’T OF CORR. & REHAB., CALIFORNIA PRISONERS, PRISON FACILITIES, available at http://www.cdcr.ca.gov/Facilities_Locator/index.html (demonstrating California’s massive prison construction between the mid-1970s through the 2000s).

5. 131 S. Ct. at 1923 (“For years the medical and mental health care provided by California’s prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners’ basic health needs. Needless suffering and death have been the well-documented result.”). “Design capacity” is the number of people each prison was constructed to house. In its initial population-reduction order, the district court calculated design capacity “based on one inmate per cell, single bunks in dormitories, and no beds in

two years to shed approximately 33,000 prisoners.⁶

In years past, California might have responded by building more prison space. After all, the *Plata* order only required the State to reduce overcrowding, not necessarily to reduce the actual numbers of people imprisoned.⁷ The State could theoretically “reduce” its prison population to 137.5 percent of capacity by increasing capacity rather than reducing the number of prisoners.

Given fiscal realities, however, that was not a politically viable option. At the time the Supreme Court decided *Plata*, a twenty-five billion dollar annual budget deficit,⁸ fallout from the international financial crisis and the housing market collapse had left California’s state and local governments on the brink of fiscal disaster.⁹ Instead of undertaking new prison construction it could not afford, the State’s plan to comply with the *Plata* order centered on “Realignment,”¹⁰ a legislative package drafted and pushed through the Legislature by Governor Edmund G. Brown Jr.’s administration.¹¹ Described by

space not designed for housing.” See Defendant’s Motion to Vacate or Modify Population Reduction Order at 8, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2013) (No. 01-1351).

6. California state prisons were designed to hold 79,858 prisoners. However, they housed approximately 143,000 prisoners at the time of the *Plata* decision, which ordered California to reduce its prison population by approximately 33,000 prisoners to 137.5 percent of design capacity, or approximately 109,800 prisoners. *Id.* at 1943–47; *State Responds to Three-Judge Court’s Order Requiring a Reduction in Prison Crowding*, CDCR TODAY (June 7, 2011), <http://cdcrtoday.blogspot.com/2011/06/state-responds-to-three-judge-courts.html> [hereinafter *State Responds to Three-Judge Court’s Order*].

7. *Plata*, 131 S. Ct. at 1941.

8. EDMUND G. BROWN JR., 2011–12 GOVERNOR’S BUDGET SUMMARY, TO THE CALIFORNIA LEGISLATURE, REGULAR SESSION 2011–12 at 4 (Jan. 10, 2011), available at <http://www.ebudget.ca.gov/2011-12-EN/pdf/BudgetSummary/FullBudgetSummary.pdf> [hereinafter 2011–12 GOVERNOR’S BUDGET SUMMARY] (“California is projected to face a budget gap of \$25.4 billion in 2011–12. This gap is made up of a current-year shortfall of \$8.2 billion and a budget-year shortfall of \$17.2 billion.”).

9. See CAL. LEG. ANALYST’S OFFICE, THE 2011–12 BUDGET: CALIFORNIA’S FISCAL OUTLOOK (Nov. 10, 2010), available at http://www.lao.ca.gov/reports/2010/bud/fiscal_outlook/fiscal_outlook_2010.aspx

[hereinafter THE 2011–12 BUDGET: CALIFORNIA’S FISCAL OUTLOOK]. The state budget situation has improved considerably since the Supreme Court’s *Plata* ruling. See THE 2013–14 BUDGET: CALIFORNIA’S FISCAL OUTLOOK, CAL. LEG. ANALYST’S OFFICE (Nov. 2012), available at <http://www.lao.ca.gov/reports/2012/bud/fiscal-outlook/fiscal-outlook-2012.pdf>. As discussed in more detail later in this Article, in September 2013 the California legislature allocated hundreds of millions of dollars in new funding to marginally increase prison capacity, through contracting with a private prison company and other measures, as part of the State’s ongoing efforts to meet the 137.5 percent cap.

10. The official title of the act is the “2011 Realignment Legislation addressing public safety.” A.B. 109, 2011–2012 Leg., Reg. Sess. (Cal. 2011).

11. See S.B. 105, 2013–2014 Leg., Reg. Sess. (Cal. 2013) (introduced Aug. 27, 2013); MAC TAYLOR, LEG. ANALYST’S OFFICE, ADDRESSING THE FEDERAL COURT PRISON

various commentators as “the biggest penal experiment in modern history”¹² and as one of the most significant criminal justice reforms in California since statehood,¹³ Realignment diverted tens of thousands of people annually¹⁴—who previously would have been sent to state prison for specified non-serious, non-violent, non-sex offenses—to local supervision in county jails and alternative custody programs.¹⁵ In a codified statement of legislative intent, the Legislature declared that criminal justice policies relying on building more prisons “are not sustainable, and will not result in improved public safety,” and encouraged counties to employ community-based rehabilitative alternatives to incarceration for the realigned population.¹⁶ The State assured the public and the federal courts that Realignment would reduce the prison population over the initially imposed two-year time period through attrition; by sending fewer new prisoners in to replace those being released at the normal conclusion of their sentences, the

POPULATION CAP (Sept. 4, 2013) at 2, available at <http://lao.ca.gov/handouts/crimjust/2013/Federal-Court-Population-Cap-090413.pdf> (describing S.B. 105 as the Governor’s plan to addressing the prison population cap) [hereinafter ADDRESSING THE FEDERAL COURT PRISON POPULATION CAP].

12. See, e.g., Joan Petersilia and Jessica Greenlick Snyder, *Looking Past The Hype: 10 Questions Everyone Should Ask About California’s Prison Realignment*, 5 CAL. J. POL. POL’Y 266, 266 (2013), available at http://www.bscc.ca.gov/download.php?f=/Looking_Past_The_Hype_Petersilia.pdf

13. See, e.g., Warren, Roger, *Viewpoints: Realignment can Boost Public Safety*, SACRAMENTO BEE (Nov. 13, 2011), available at <http://www.courts.ca.gov/partners/documents/realignmentpublicsafety.pdf>. The author is a retired 20-year veteran of Sacramento County trial court and is President Emeritus of the National Center for State Courts; see also DEAN MISZYNSKI, PUB. POLICY INST. OF CAL., *RETHINKING THE STATE-LOCAL RELATIONSHIP: CORRECTIONS 5* (Aug. 2011), available at http://www.ppic.org/content/pubs/report/R_811DMR.pdf (“California is changing the way it manages its adult prisons and jails more comprehensively than at any time since statehood.”).

14. *California Realignment Dashboard*, CHIEF PROBATION OFFICERS OF CAL., <http://www.cpoc.org/assets/Realignment/dashboard.swf> (last updated Mar. 16, 2014) (showing that, between October 2011 and September 2013, over 60,000 individuals who would have been sent to state prison prior to Realignment were instead diverted to local custody).

15. See CAL. PENAL CODE §§ 17.5(a), 1170(h) (West 2013); J. Richard Couzens and Tricia Bigelow, *Felony Sentencing After Realignment* at app. 1 (Mar. 4, 2014), available at http://www.courts.ca.gov/partners/documents/felony_sentencing.pdf (showing a list of the realigned offenses). There are fifty-nine crimes that are not defined in the Penal Code as serious or violent offenses, but are still served in state prison rather than in local custody. See AB 109 Crime Exclusions List (July 22, 2011), available at [http://www.cmhda.org/go/portals/0/cmhda%20files/committees/forensics/1107_forensics/ab_109_crime_exclusion_list_\(7-22-11\).pdf](http://www.cmhda.org/go/portals/0/cmhda%20files/committees/forensics/1107_forensics/ab_109_crime_exclusion_list_(7-22-11).pdf) (listing the non-serious, non-violent crimes that must still be served in state prison).

16. CAL. PENAL CODE § 17.5(a) (West 2013).

prison population would drop enough to satisfy the *Plata* order.¹⁷

As it turned out, the State was wrong.¹⁸ At the time this Article was finalized—nearly a year after the deadline originally set by the court order—the State had still failed to sufficiently reduce its prison population.¹⁹ After several intervening extensions, in December 2013 the three-judge court issued a new order requiring the State to comply by February 2016, with intermediate benchmark requirements.²⁰ As of April 14, 2014, the prison population was approximately 502 inmates above first benchmark deadline of June 30, 2014, which requires the population to be no higher than 143 percent of design capacity.²¹

This Article analyzes the impact of the *Plata* decision and Realignment at the three-year mark to assess whether California is undergoing a criminal justice paradigm shift or, if instead, it is merely shifting some of the state's mass incarceration problem from prisons to jails. We argue that the answer to that question is still unfolding and will turn upon whether California's political leaders are willing to reform some of the harsh sentencing laws that caused the prison overcrowding in the first place. We further argue that the most significant political obstacle to such reform is opposition from the same law enforcement interests that have obstructed legislative attempts to reform the state's sentencing laws for more than four decades.

The Article begins in Section I with an historical overview of the prison and incarceration boom of the past forty years, explaining how

17. *The Cornerstone of California's Solution to Reduce Overcrowding, Costs, and Recidivism*, CAL. DEP'T OF CORR. & REHAB., <http://www.cdcr.ca.gov/realignment/> (describing Realignment as "the cornerstone of California's solution for reducing the number of inmates across the state's prisons to 137.5 percent of design capacity by June 27, 2013, as ordered by the Three-Judge Court and affirmed by the U.S. Supreme Court").

18. See Declaration of James Austin in Support of Plaintiffs' Statement in Response to October 11, 2012 Order Regarding Population Reduction at 2, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2013) (No. 01-1351).

19. See *Weekly Report of Population as of Midnight April 16, 2014*, CAL. DEP'T OF CORR. & REHAB. (Apr. 16, 2014), available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Weekly_Wed/TPOP1A/TPOP1Ad140416.pdf (showing that the state is still above the court ordered level of 137.5 percent capacity).

20. Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013 Deadline, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2013) (No. 01-1351); Opinion Re: Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013 Deadline, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2013) (No. 01-1351).

21. See DEP'T OF FINANCE, SENATE BILL 105 INTERIM REPORT at 3 (Apr. 1, 2014), available at http://www.dof.ca.gov/budget/historical/2014-15/documents/SB-105_Report-Final.pdf [hereinafter SENATE BILL 105 INTERIM REPORT].

California's prisons became so dangerously overcrowded in the first place.

In Section II, we describe the Supreme Court's 2011 *Plata* ruling, the litigation leading up to it, and the State's initial attempts to build its way out of the over-crowding problem.

In Section III we describe the Realignment legislation, including its remarkable statement of legislative intent. We identify three significant and related problems that have thwarted that legislative intent and Realignment's potential to usher in a new criminal justice paradigm.²² First, we argue that the legislation left counties too much discretion to incarcerate the "realigned" population in local jails rather than embrace the legislation's focus on evidence-based alternatives to incarceration. Second, the legislation failed to include sufficient evaluation and accountability mechanisms. Third, the state formula for determining how realignment funding would be allocated to the various counties failed to sufficiently incentivize counties to incarcerate less. Fourth, the Realignment legislation did nothing to address the problem of excessive pre-trial incarceration in county jails. We argue that because of these shortcomings Realignment in its current form has not only failed to solve the prison overcrowding problem, but is also exacerbating preexisting jail overcrowding problems that may lead to further litigation and federal court intervention. We propose reforms that can reduce pressure on local jail populations and incentivize counties to utilize evidence-based alternatives to incarceration that have been demonstrated to reduce crime by reducing recidivism.²³

In Section IV, we set out several significant political, legislative and litigation-related developments that have occurred during the three years since the Legislature enacted Realignment. We first discuss the State's retreat from its initial insistence that Realignment alone would be enough to solve the prison overcrowding problem.²⁴ The State has now explicitly acknowledged to the three-judge court and to the public that, in fact, Realignment will *never* suffice to reduce the prison population to 137.5 percent of design capacity.²⁵ We next describe a

22. See *infra* Section III.C.

23. *Id.*

24. See *State Responds to Three-Judge Court's Order*, *supra* note 6 (California Department of Corrections and Rehabilitation Secretary Matthew Cate stating, "AB 109 is the cornerstone of the solution [to address overcrowding], and the Legislature must act to protect public safety by funding Realignment.").

25. See Defendant's Response to October 11, 2012 Order to Develop Plans to Achieve Required Prison Population Reduction at 1, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2013) (No. 01-1351); Defendant's Motion to Vacate or Modify Population Reduction Order,

new legislative package the State enacted in September 2013, SB 105, to supplement Realignment in reducing the prison population.²⁶ SB 105 includes the possibility of new funding that might help incentivize counties to make greater use of alternatives to incarceration and send fewer people to state prison.²⁷ The bill's predominant thrust, however, is to increase the State's prison capacity through mechanisms that include new authority and funding to contract with private in-state and out-of-state prisons.²⁸ We then discuss the *Plata* three-judge court's February 2014 order granting another extension of the deadline for the State to meet the 137.5 percent population cap, giving the State until February 2016.²⁹ Unlike previous extensions, this order includes significant new enforcement provisions the federal courts have never before imposed in the long course of the *Plata* litigation. Perhaps most significant is the appointment of a Compliance Monitor, who has the authority to order prisoners released prior to the end of their sentences if the State fails to meet intermediate population reduction benchmarks.³⁰ In addition, the State stipulated that it would not appeal any further orders of the three-judge court or the Compliance Monitor; this concession by the State is especially significant given the previous course of this decades-long litigation with multiple trips to the U.S. Supreme Court.³¹

In Section V, we argue that Realignment alone cannot shift the criminal justice paradigm in California because it does not address a fundamental cause of prison and jail over-crowding: the State punishes far too many non-serious, non-violent offenses as felonies, and imposes excessive sentences for them. We propose reforming sentencing laws,

supra note 5 at 2. See also *Three-Judge Court Updates*, CAL. DEP'T OF CORR. & REHAB., http://www.cdcr.ca.gov/News/3_judge_panel_decision.html (compiling updated figures). This stark admission that Realignment alone was not going to be sufficient to meet the court's population cap requirement confirmed what the plaintiffs experts had already known to be true. See Declaration of James Austin in Support of Plaintiffs' Statement in Response to October 11, 2012 Order Regarding Population Reduction, *supra* note 18, at 2.

26. S.B. 105, *supra* note 11; CAL. GOV'T. CODE §§ 19050.2, 19050.8; CAL. PENAL CODE. §§ 1233.1, 1233.3, 1233.4, 1233.9, 2910, 2915, 6250.2, 11191, 13602; 2012 Cal. Stat. § 15, ch. 42 (Cal. 2013).

27. S.B. 105, *supra* note 11.

28. *Id.*

29. See Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013 Deadline, *supra* note 20, at 2. This order is discussed in more detail below.

30. *Id.* at 2; Opinion Re: Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013 Deadline, *supra* note 20, at 3.

31. Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013 Deadline, *supra* note 20, at 3-4.

including reducing the penalties for low-level non-violent drug and property crimes, and explain the dramatic and sustainable impact these sentencing reforms would have on prison and jail populations.³² We argue that these reforms are possible only if the State can overcome political obstacles, most significantly an oppositional and influential law enforcement lobby.³³ Two recent legislative examples are presented which demonstrate that—despite pressures of the *Plata* litigation and widespread public support for these reforms—lawmakers have continued, even after Realignment, to capitulate to the well-organized law enforcement lobby that has repeatedly defeated criminal justice reform legislation over the past 40 years.³⁴

Finally, we conclude by arguing that even if the State can comply with the three-judge court's order, California prisons will still be overflowing with tens of thousands more incarcerated than they were designed to house. The 137.5 percent target represents only the minimum prison population reduction necessary to satisfy the federal court mandate. It is far from clear that this reduction will improve conditions enough to end constitutionally prohibited cruel and unusual punishment.³⁵ Even if so, this is a low bar. The standards for sound criminal justice policy, effective corrections management, and basic good government should be higher than simply meeting the bare minimum required by the U.S. constitution. Complying with *Plata* ought to be the beginning, not the end, of the conversation about reforming the state's criminal justice policies.

I. FROM REHABILITATION TO RETRIBUTION: FORTY YEARS OF TOUGH-ON-CRIME POLICIES

Over the past four decades, the United States has become the world's largest jailer.³⁶ With less than five percent of the world's

32. See *infra* Section V.A.

33. See *infra* Section V.B.

34. *Id.*

35. See *infra* note 380.

36. See James P. Lynch & William Alex Pridemore, *Crime in International Perspective*, in *CRIME AND PUBLIC POLICY* 5, 27 (James Q. Wilson & Joan Petersilia eds., 2d ed. 2010) ("In terms of population-based incarceration rates, the United States is clearly the most punitive nation in the world."); CONNIE DE LA VEGA ET AL., *CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT* 9 (May 2012), available at http://www.usfca.edu/law/clgj/criminalsentencing_pr/ (This comprehensive comparative analysis of sentencing and carceral practices in the U.S. and the rest of the world found that "the United States has the largest prison population in the world and the highest incarceration rate in the world. Never before have so many people been locked up for so long and for so little as in the United States.").

population,³⁷ the United States incarcerates nearly twenty-five percent of the world's prisoners.³⁸ The United States has more people in its prisons and jails than all of Europe combined, and more than China—which has about one billion more people than the United States.³⁹ Harsh drug law enforcement and sentencing over the four decades—since President Richard Nixon's declaration of the "war on drugs"⁴⁰—has been a driving force in the U.S. incarceration explosion.⁴¹ There are

37. In 2012, the population of the U.S. was 313,914,040 people or 4.45 percent of the worldwide population, totaling 7,046,368,812 people. *See Population (Total)*, THE WORLD BANK, available at <http://data.worldbank.org/indicator/SP.POP.TOTL> (last visited Jan. 2, 2014) (Population figures are based on "(1) United Nations Population Division. World Population Prospects, (2) United Nations Statistical Division. Population and Vital Statistics Report (various years), (3) Census reports and other statistical publications from national statistical offices, (4) Eurostat: Demographic Statistics, (5) Secretariat of the Pacific Community: Statistics and Demography Programme, and (6) U.S. Census Bureau: International Database.").

38. *See* ROY WALMSLEY, WORLD PRISON POPULATION LIST 3 (9th ed. Apr. 2012), available at <http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf> (demonstrating that the U.S. houses approximately 23 percent of the world's incarcerated population).

39. The U.S. incarcerates approximately 2.29 million people as compared to both China and all of Europe combined, which incarcerate approximately 1.65 million and 1.85 million people respectively. *Id.* at 4–6. Moreover, in 2012 China had a population of approximately 1.35 billion, which is over a billion more people than the approximately 313.9 million people in the U.S. the same year. *See* THE WORLD BANK, *supra* note 37.

40. *See The New Public Enemy No. 1*, TIME, June, 28, 1971 at 20. *See also* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA, University 18–19 (2007) ("Drug commitments to federal and state prisons surged 975 percent between 1982 and 1999, even though according to the Bureau of Justice Statistics, illegal drug use in the U.S. declined drastically starting in the mid-1970s."); E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, NCJ 239808, PRISONERS IN 2011 6 (Dec. 2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf> (showing an increase in imprisonment rates from 470 per 100,000 in 2000 to a high of 506 per 100,000 in 2007 and 2008 and back down to 492 per 100,000 in 2011); ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEP'T OF JUSTICE, NCJ 188207, PRISONERS IN 2000 1 (Aug. 2001), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p00.pdf> (showing an increase in incarceration rates of people held in state or federal prisons from 292 per 100,000 in 1990 to 477 per 100,000 in 2000); ROBYN L. COHEN, U.S. DEP'T OF JUSTICE, PRISONERS IN 1990 2 (May 1991), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p90.pdf> (showing an increase of incarceration rates from 139 per 100,000 in 1980 to 293 per 100,000 in 1990).

41. *See* Lynch & Pridemore, *supra* note 36, at 44 ("The aggressive stance that the United States has taken toward drug crime is also a major contributor to the prison population. The United States is more likely to treat drug activity as a crime than most other nations, more likely to sentence convicted persons to prison, and more likely to require offenders to serve more time. Other nations may be similar to the United States in one of these aspects, but none is as punitive in all of these respects."). *See also id.* at 40–42; DE LA VEGA ET AL., *supra* note 36, at 8 ("[T]he United States is an outlier among countries in its sentencing practices The number of prisoners serving LWOP sentences is more than 41,000 in the United States. In contrast there are 59 serving such sentences in Australia, 41

now over 500 percent more people in jail and prison in the United States than in 1980.⁴²

During this same time period, California enacted some of the most draconian sentencing and parole regimes in the country.⁴³ California's prison population increased by more than eight-fold from approximately 21,000 in the mid-70s to 171,000 at its peak in 2008,⁴⁴ and the number of state prisons increased from twelve to the thirty-four operating today.⁴⁵ As with mass incarceration nationwide, drug sentencing has been an overwhelming factor in California's prison overcrowding crisis. In 1970, approximately five per 100,000 Californians were incarcerated in state prisons on drug convictions; by the late 1990's, that number had increased more than ten-fold.⁴⁶ Not

in England and 37 in the Netherlands.”).

42. See CARSON & SABOL, *supra* note 40, at 1 (showing approximately 1.6 million prisoners under state and federal jurisdiction at year-end 2011); PAIGE M. HARRISON, U.S. DEP'T OF JUSTICE, PRISONERS IN CUSTODY OF STATE OR FEDERAL CORRECTIONAL AUTHORITIES, 1977-98 (Sept. 1, 2000), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2080> (showing approximately 319,600 prisoners under state and federal jurisdiction at year-end 1980).

43. See, e.g., CAL. PENAL CODE §§ 667(b); 1170(a)(1); 1170.12 (West 2013).

44. See *infra* Figure 2. See also CAL. DEP'T OF CORR. & REHAB., REP., HISTORICAL TRENDS: INSTITUTION AND PAROLE POPULATION 1976-1996, at 1a (Sept. 1997), *available at*

http://www.cdcr.ca.gov/reports_research/offender_information_services_branch/Annual/HIST2/HIST2d1996.pdf (reporting a total prison population of 21,088 individuals as of Dec. 31, 1976) [hereinafter HISTORICAL TRENDS: INSTITUTION AND PAROLE POPULATION 1976-1996]; CAL. DEP'T OF CORR. & REHAB., CORRECTIONS YEAR AT A GLANCE 12 (Fall 2011), *available at*

http://www.cdcr.ca.gov/News/docs/2011_Annual_Report_FINAL.pdf (showing that the total adult prison population peaked in 2008 with 171,161 prisoners).

45. See Sharon Dolovich, *supra* note 4, at 331; CAL. DEP'T OF CORR. & REHAB., MAP OF CALIFORNIA'S CORRECTIONAL AND REHABILITATION INSTITUTIONS (Feb. 2014), *available at* <http://www.cdcr.ca.gov/map/docs/Correctional-and-Rehabilitation-Institutions-with-Parole-Regions.pdf> (showing that there are 34 state-level adult prisons in California).

46. See CAL. DEP'T OF CORR. & REHAB., CALIFORNIA PRISONERS 1970 AND 1971: SUMMARY STATISTICS OF FELON PRISONERS AND PAROLEES 14 (1971), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd1970_71.pdf (data for 1970); CAL. DEP'T OF CORR. & REHAB., CALIFORNIA PRISONERS AND PAROLEES 2000: SUMMARY STATISTICS ON FELON PRISONERS AND PAROLEES, CIVIL NARCOTIC ADDICT INPATIENTS AND OUTPATIENTS AND OTHER POPULATIONS, at tbl.9, *available at*

http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPrisArchive.html (documenting changes in California's inmate population over the years). See also SASHA ABRAMSKY, SACRAMENTO'S K-STREET LOBBYISTS: THE CRIMINAL JUSTICE INNER CIRCLE 2 (2011), *available at*

http://pubs.mantisintel.com/Sacramento's_K_Street_Lobbyists.pdf (commissioned by the Center on Juvenile and Criminal Justice (CJCJ) as part of CJCJ's Interest Groups and

surprisingly, all of this came at significant social and financial cost.⁴⁷

Unequal treatment in the criminal justice system—especially in drug law enforcement—has a ripple effect extending beyond courtrooms and prisons and is one of the primary drivers of racial inequality in California and the nation.⁴⁸ A higher proportion of blacks are incarcerated in California today than were in Apartheid South Africa.⁴⁹ Latinos are now the fastest-growing and largest group incarcerated in California state prisons.⁵⁰ California over-relies on its criminal justice system—especially the selective yet excessive use of incarceration—to address complex economic, mental health, drug addiction, and other social problems that can never be solved simply by locking more people behind bars for longer and longer periods of time.⁵¹

To house this explosion in the numbers of people incarcerated in the state, California undertook what government analysts called “the biggest prison building project in the history of the world.”⁵² Between

Criminal Justice Policy project).

47. See, e.g., CALIFORNIA BUDGET PROJECT, STEADY CLIMB: STATE CORRECTIONS SPENDING IN CALIFORNIA, BUDGET BACKGROUNDER 1 (2011), available at http://www.cbp.org/pdfs/2011/11-014_Corrections_Spending_BB.pdf.

48. See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 6–7 (2010).

49. African Americans are incarcerated at a rate of approximately 2,130 per 100,000 in California prisons; this figure does not include those incarcerated in county jails or federal prisons located in California. See CAL. DEP’T OF CORR. & REHAB., CALIFORNIA PRISONERS AND PAROLEES 19 (2009) [hereinafter CDCR Estimates and Statistical Analysis], available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2009.pdf (48,990 African Americans were incarcerated in CDCR institutions at year-end 2009); *Profile of General Population and Housing Characteristics: 2010 (California)*, U.S. CENSUS BUREAU, <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (there were approximately 2,299,072 African Americans in California in 2010); *Section IV: Global Comparisons, Crime and incarceration around the world: U.S. vs. South Africa*, PRISON POLICY INITIATIVE, http://www.prisonpolicy.org/prisonindex/us_southafrica.html (under Apartheid, South African black were incarcerated at a rate of approximately 851 per 100,000).

50. See CDCR Estimates and Statistical Analysis, *supra* note 49 (“Hispanics” make up 39.3 percent of the CDCR institution population, while whites, blacks and others represent 25.6 percent, 29.0 percent, and 6.1 percent respectively).

51. See GILMORE, *supra* note 40, at 7, 87–127. See generally ALEXANDER, *supra* note 48§.

52. See GILMORE, *supra* note 40, at 5, 27 (2007) (citing CARY J. RUDMAN & JOHN BERTHELSEN, AN ANALYSIS OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS’ PLANNING PROCESS: STRATEGIES TO REDUCE THE COSTS OF INCARCERATING STATE PRISONERS (1991)) (addressing the questions of “how, why, where and to what effect one of the planet’s richest and most diverse political economies has organized and executed a

1984 and 2005, the State built twenty-three new major prison facilities, costing between \$280 million and \$350 million each,⁵³ to accommodate an immense increase in the size of California's incarcerated population, despite steady decreases in the crime rate,⁵⁴ and in the face of mounting scientific evidence suggesting that increasing the rate of incarceration does not substantially reduce crime.⁵⁵ In fact, crime rates for 2010/2011 were approximately the same as they were in 1960.⁵⁶ Yet, the State's correctional population increased 217 percent per capita during the same period, from 21,660 (138 per 100,000 people) in 1960 to 162,598 individuals (426 per 100,000 people) in 2010/2011.⁵⁷ Building and staffing all these prisons was enormously expensive. Corrections spending increased from approximately \$1 billion (4.1 percent of the State's general fund allocation) in fiscal year 1984–85 to \$9.7 billion (10.7 percent of the State's general fund allocation) in fiscal year 2008–09.⁵⁸

In addition to the drug war itself, this massive prison growth was fueled by some of the most draconian sentencing and parole regimes in the country. When California adopted the Uniform Determinate Sentencing Law in 1976, the State Legislature explicitly shifted the focus of incarceration away from rehabilitation and toward

prison-building and-filling plan that government analysts have called 'the biggest . . . in the history of the world.' ”).

53. *Id.* at 7. Gilmore notes that the State had previously built only twelve prisons between 1852 and 1964, and that in addition to the twenty-three major facilities referenced here, the State had also added thirteen small (500 bed) community corrections facilities, five prison camps and five mother-prisoner centers. *Id.*

54. See *infra* Figure 2 (demonstrating that reported crimes in California have steadily declined over the past three decades while incarceration rates have steadily increased). See also GILMORE, *supra* note 40, at 7 (“The California state prison population grew nearly 500 percent between 1982 and 2000, even though the crime rate peaked in 1980 and declined, unevenly but decisively, thereafter.”).

55. See Rucker Johnson & Steven Raphael, *How Much Crime Reduction Does the Marginal Prisoner Buy?* 55 J.L. & ECON. 275, 302–10 (2012). The question of whether and how incarceration rates affect crime is, of course, a complicated one that has been the subject of much scholarly debate. See, e.g., ALFRED BLUMSTEIN & JAMES Q. WILSON, PEW CTR. ON THE STATES, THE IMPACT OF INCARCERATION ON CRIME: TWO NATIONAL EXPERTS WEIGH IN (Apr. 2008), available at <http://www.pewstates.org/research/reports/the-impact-of-incarceration-on-crime-85899374230>.

56. In 2010/2011 there were 3,203 reported crimes per 100,000 Californians, as compared to 1960 when there were 3,474 reported crimes per 100,000 Californians. See *infra* Figure 1 and Table 1.

57. *Id.*

58. See CAL. LEG. ANALYST'S OFFICE, HISTORICAL DATA (Sept. 2012), available at <http://www.lao.ca.gov/PolicyAreas/state-budget/historical-data> (reporting annual budgets, including corrections allocations, from 1984–85 through 2012–13).

punishment.⁵⁹ Reinforced over decades, the State's system of determinate sentencing prescribes significant sentence enhancements for prior convictions, sharply limits judicial discretion to determine sentence length, requires judges to impose a fixed sentence from three defined terms (a lower, middle and upper) for felony offenses depending on the presence of mitigating or aggravating factors, and makes post-release supervision automatic for virtually everyone who finishes a prison sentence.⁶⁰

California voters have been equally aggressive in increasing criminal penalties. Between 1972 and 1994, voters enacted numerous state ballot initiatives ratcheting up sentencing laws, including Proposition 17 (1972, death penalty); Proposition 7 (1977, murder penalty); and Proposition 115 (1989 "Crime Victim Justice Reform Act").⁶¹ In 1982, voters enacted Proposition 8, the Victims' Bill of Rights.⁶² In addition to changing the rules of evidence to make prosecutions and convictions easier, Prop. 8 increased sentences for persons with prior convictions and limited plea-bargaining and bail for specified crimes.⁶³

Most notorious is California's "Three Strikes" law.⁶⁴ Enacted by voters in 1994, the law mandates a double sentence for anyone convicted of a felony having previously suffered one prior serious or violent felony conviction and a sentence of 25-years-to-life for most persons convicted of a felony having previously suffered two previous

59. The Uniform Determinate Sentencing Act, Senate Bill 42 passed 1976 and effective 1977, specified that "the purpose of imprisonment for crime is punishment." CAL. PENAL CODE § 1170(a)(1) (West 2013). *See also* Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 210 (2008); VANESSA BARKER, THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS 201 n.19 (2009) (collecting sources).

60. *See* Petersilia, *supra* note 59, at 253–54. Since the enactment of Realignment, those released from prison whose current convictions were for non-serious, non-violent felonies and who are not deemed high risk sex offenders are placed in post-release community supervision, where they are supervised locally by county probation. *See infra* Section III.A. Individuals released from prison who do not qualify for PRCS remain in the traditional state-run parole system.

61. *See* CAL. SEC'Y OF STATE, INITIATIVES BY TITLE AND SUMMARY YEAR, *available at* <http://www.sos.ca.gov/elections/ballot-measures/pdf/initiatives-by-title-and-summary-year.pdf>.

62. *Id.*

63. *See* BARKER, *supra* note 59, at 47–84 (describing the shift in California correctional policy beginning in 1967, with the Reagan-Deukmejian Penalty Package, Senate Bill 85–87, from a rehabilitative to a retributive model largely justified by a focus upon victims and mandating and stiffening penal sanctions).

64. CAL. PENAL CODE § 1170.12 (West 2004).

serious or violent convictions.⁶⁵ The law also eliminated probation for many individuals with prior convictions and substantially increased the sentences for second offenses.⁶⁶ Although twenty-six other states and the federal government enacted their own versions of three strikes laws, California, until recently,⁶⁷ remained among the very small minority imposing life sentences regardless of the severity of the third, or “triggering,” felony.⁶⁸ Despite its proponents’ contentions, in the seventeen years that followed its enactment, the Three Strikes law had no demonstrable effect on violent crime levels.⁶⁹ It did, however, have a sizable effect on incarceration rates. Notwithstanding decreasing crime rates—and California Department of Corrections and Rehabilitation (“CDCR”) data demonstrating that longer prison terms fail to reduce recidivism or crime rates⁷⁰—there were approximately

65. *Id.* §§ 667, 1170.12. On March 7, 1994, the California Legislature amended California Penal Code § 667, to include the language known colloquially as the “Three Strikes Law.” Eight months later, as a sign of the general populace’s support, the California voters codified nearly identical language at California Penal Code § 1170.12 through Proposition 184. Further discrepancies between the two statutes have been resolved by the Courts, such as § 1170.12’s failure to include all qualifying prior out-of-state felonies. *See People v. Hazelton*, 926 P.2d 423 (Cal. 1996).

66. *Id.*

67. *See Prop. 36, The Three Strikes Law, Repeat Felony Offenders, Penalties, Initiative Statute*, CAL. SEC’Y OF STATE (2012), available at <http://voterguide.sos.ca.gov/propositions/36/title-summary.htm> [hereinafter *Prop. 36*].

68. *See* JOHN CLARK, JAMES AUSTIN & D. ALAN HENRY, “THREE STRIKES AND YOU’RE OUT”: A REVIEW OF STATE LEGISLATION, RESEARCH IN BRIEF (NAT’L INST. OF JUSTICE) at 7–9 (Sept. 1997), available at <https://www.ncjrs.gov/pdffiles/165369.pdf>. *See also* Petersilia, *supra* note 59, at 210.

69. MIKE MALES, CTR. ON JUVENILE & CRIMINAL JUSTICE, STRIKING OUT: CALIFORNIA’S “THREE STRIKES AND YOU’RE OUT” LAW HAS NOT REDUCED VIOLENT CRIME: A 2011 UPDATE 2 (2011), available at http://www.cjcj.org/files/Striking_Out_Californias_Three_Strikes_And_Youre_Out_Law_Has_Not_Reduced_Violent_Crime.pdf.

70. The California Department of Corrections and Rehabilitation’s data show that people serving one, two, or three years have nearly the same recidivism rates. *See* HISTORICAL TRENDS: INSTITUTION AND PAROLE POPULATION 1976–1996, *supra* note 44, at 12. Meanwhile, New York and New Jersey have significantly reduced their prison populations *and* continued to lower their crime rates. *See* JAMES AUSTIN & MICHAEL JACOBSON, HOW NEW YORK CITY REDUCED MASS INCARCERATION: A MODEL FOR CHANGE? 6 (Jan. 2013), available at http://www.brennancenter.org/sites/default/files/publications/How_NYC_Reduced_Mass_Incarceration.pdf (“New York is one of the first states to significantly reduce its entire correctional population. . . . This reduction occurred as the crime rate sharply declined in New York, showing that increasing imprisonment or other forms of correction are not needed to enjoy a lower crime rate.”); Brief for Center on the Administration of Criminal Law and 30 Criminologists as Amici Curiae Supporting Appellees, *Schwarzenegger v. Plata*, 130 S. Ct. 3413 (2010) (No. 09-1233) (“New Jersey likewise experienced declining crime rates contemporaneously with declining prison populations: the crime rate there fell

33,000 second strikers and 9,000 third strikers in prison by 2012, at significant taxpayer expense.⁷¹

Table 1 and Figures 1 and 2 below illustrate crime and incarceration trends over time in California.⁷² First, Table 1 compares

17% from 2000 to 2008, while the number of offenders sentenced to prison declined by 7%.”); Craig Haney, *Prison Effects of in the Age of Mass Incarceration*, THE PRISON J. 15 (Jan. 25, 2012), available at <http://tpj.sagepub.com/content/early/2012/09/11/0032885512448604> (finding that imprisonment has a “criminogenic”—crime producing—effect; moreover, the more time served the more likely one is to offend again).

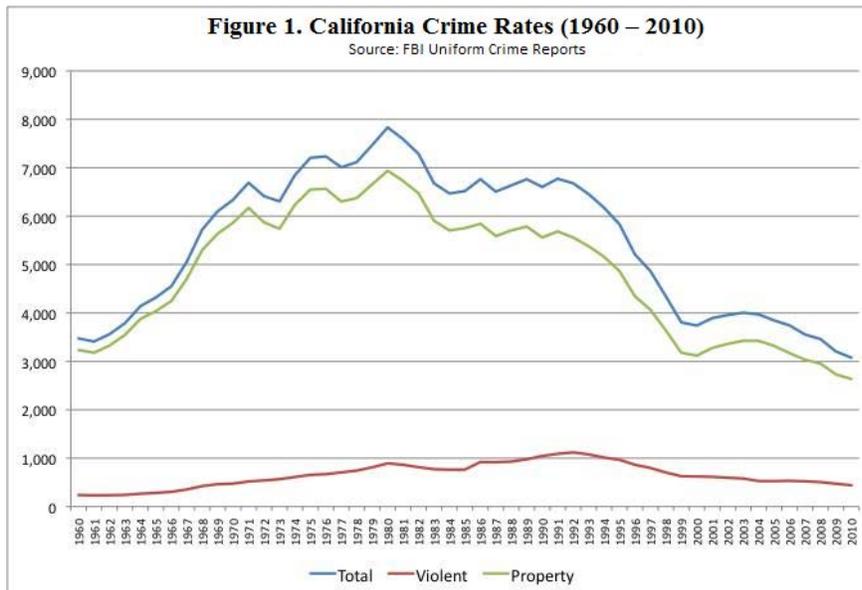
71. See Declaration of James Austin in Support of Plaintiffs’ Statement in Response to October 11, 2012 Order Regarding Population Reduction, *supra* note 18. Analysts have documented wide disparities in Three Strikes charging decisions from county to county. A 2005 report from the non-partisan California Legislative Analyst’s Office (LAO) found that Kern County was over 13 times more likely to send an arrestee to state prison with a strike enhancement than San Francisco County. See *A Primer: Three Strikes—The Impact After More Than a Decade*, CAL. LEG. ANALYST’S OFFICE (Oct. 2005), http://www.lao.ca.gov/2005/3_strikes/3_strikes_102005.htm [hereinafter *A Primer: Three Strikes*] (“Based on discussions with representatives of the courts and district attorneys’ offices, we conclude that local county justice systems have developed various strategies for handling their Three Strikes caseloads, based on different policy priorities and fiscal constraints. Thus, the manner in which the law is implemented at the local level by prosecutors and judges varies across counties. In some counties, for example, prosecutors seek Three Strikes enhancements only in certain cases, such as for certain types of crimes that are particular problems in their county or where the current offense is serious or violent. In other counties, prosecutors seek Three Strikes enhancements in most eligible cases. Similarly, judges vary in how often they dismiss prior strikes, based on discretion afforded to them under the Romero decision. In addition, variation in the application of Three Strikes not only exists across counties, but can also occur within counties. In particular, prosecution practices change over time as counties experience turnover of district attorneys and judges and as they develop new methods for handling Three Strikes cases.”). See also Ina Jaffe, *Cases Show Disparity Of California’s 3 Strikes Law*, NPR (Oct. 30, 2009), <http://www.npr.org/templates/story/story.php?storyId=114301025>; MEGAN BERWICK, RACHEL LINDENBERG, & JULIA VAN ROO, *WOBBLEERS & CRIMINAL JUSTICE IN CALIFORNIA A STUDY INTO PROSECUTORIAL DISCRETION 1* (Mar. 20, 2010), available at <http://ips.stanford.edu/sites/default/files/shared/DA%20Discretion%20Final%20Report.pdf> (“This study confirms that there is wide variation among California counties in the percentages of wobblers charged as misdemeanors.”).

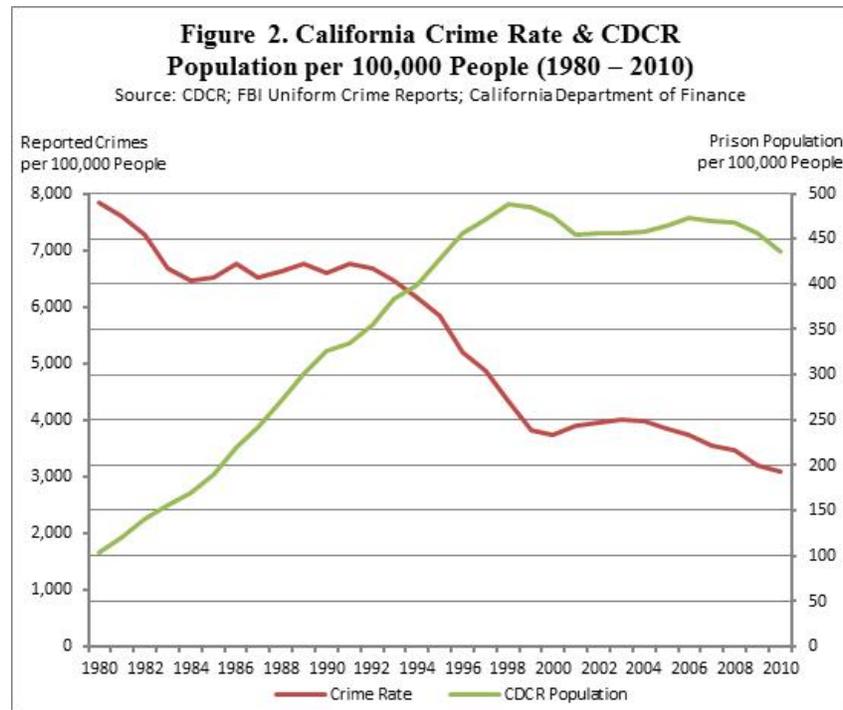
72. Data are based on crimes that are reported to sheriffs’ and police departments. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, available at <http://www.fbi.gov/about-us/cjis/ucr/ucr>. Crime rates in recent years may be inflated as a result of increased smartphone and tablet theft. See, e.g., Don Thompson, *California bill to deter smartphone thefts advances; mandates built-in shut-off technology*, U.S. NEWS & WORLD REPORT, May 8, 2014, available at <http://www.usnews.com/news/technology/articles/2014/05/08/california-smartphone-kill-switch-bill-advances> (describing smartphone and tablet theft as a “crime wave sweeping” California); Rolfe Winkler, *Fighting the iCrime Wave, Device theft has exploded. New solutions are on the way. Is the industry doing enough about ‘Apple picking’?*, WALL STREET J., Jul. 27, 2014, available at <http://online.wsj.com/news/articles/SB10000872396390443931404577550823904439852> (“Police across the nation are fighting surges in mobile phone and tablet thefts.”).

the overall state population, crime rates, and the per capita prison population in 1960 with 2010 figures. Next, Figure 1 provides a breakdown of California crime rates from 1960 to 2010. Finally, Figure 2 demonstrates the state’s crime rates and prison population from 1980 to 2010. As shown, over time California continued to incarcerate increasing numbers of people in prison despite decreasing crime rates.

Table 1. 1960 and 2010 Comparisons

	1960	2010/11	% Change
California Population	15,717,204	37,253,956	137%
Crime Rate (crimes per 100,000)	3,474	3,203	-8%
Prison Population	21,660	162,598	651%
Rate Per 100,000	138	436	217%
Parole Population	8,511	103,828	1,120%
Rate Per 100,000	54	279	415%
What the California Prison Population Would Be Based on 1960 Crime and Incarceration rates Applied to 2010 California Population			
51,340 prisoners			
What the California Parole Population Would Be Based on 1960 Crime and Incarceration rates Applied to 2010 California Population			
20,173 parolees			





II. BREAKING POINT: THE FEDERAL COURTS STEP IN

By 2006, California's prisons were operating at nearly double their capacity.⁷³ In 2007, the Little Hoover Commission⁷⁴ found that:

California's correctional system is in a tailspin that threatens public safety and raises the risk of fiscal disaster. The failing correctional system is the largest and most immediate crisis facing policy-makers. For decades, governors and lawmakers fearful of appearing soft on crime have failed to muster the political will to address the looming crisis. And now their time has run out.⁷⁵

⁷³ See *Coleman v. Schwarzenegger*, 922 F.Supp.2d at 888 (E. D. Cal. 2009).

⁷⁴ The Little Hoover Commission is a statutorily-created state agency tasked with "promoting economy, efficiency, and improved service in the transaction of the public business in the various departments, agencies, and instrumentalities of the executive branch of the state government, and in making the operation of all state departments, agencies, and instrumentalities, and all expenditures of public funds, more directly responsive to the wishes of the people as expressed by their elected representatives." Cal. Gov't. Code §§ 8501, 8521.

⁷⁵ LITTLE HOOVER COMM'N, SOLVING CALIFORNIA'S CORRECTIONS CRISIS: TIME IS RUNNING OUT (Jan. 25, 2007) at i, [hereinafter LITTLE HOOVER COMM'N] available at

At the time the Little Hoover Commission sounded that alarm, the federal courts were about to intercede in a dramatic fashion. Two class-action lawsuits on behalf of California prisoners, *Coleman v. Wilson* and *Plata v. Davis*, had been slowly wending their way through the courts; *Coleman* was originally filed in 1990 and *Plata* in 2001.⁷⁶ In 2007 the cases were consolidated before a three-judge district court, which was convened to consider a population reduction order pursuant to the PLRA.⁷⁷ On August 4, 2009, the three-judge court found that overcrowding in California's prisons created conditions that violated the Eighth Amendment's prohibition against cruel and unusual punishment:

The state's prisons have become places of extreme peril to the safety of persons they house, while contributing little to the safety of California's residents. California spends more on corrections than most countries in the world, but the state reaps fewer public safety benefits. Although California's existing prison system serves neither the public nor the inmates well, the state has for years been unable or unwilling to implement the reforms necessary to reverse its continuing deterioration. . . . The massive 750% increase in the California prison population since the mid-1970s is the result of political decisions made over three decades, including the shift to inflexible determinate sentencing and the passage of harsh mandatory minimum and three-strikes laws, as well as the state's counterproductive parole system. . . . The convergence of tough-on-crime policies and an unwillingness to expend the necessary funds to support the population growth has brought California's prisons to the breaking point. . . . California's prisons remain severely overcrowded, and inmates in the California prison system continue to languish without constitutionally adequate medical and mental health care. . . . Where the political process has utterly failed to protect the constitutional rights of a minority, the courts can, and must, vindicate those rights.⁷⁸

The three-judge court ordered the State to submit a plan that would reduce its prison population to 137.5 percent of design capacity within

<http://www.lhc.ca.gov/studies/185/Report185.pdf>.

76. Originally filed as *Coleman v. Wilson*, 912 F. Supp. 1282 (E. D. Cal. 1995); *Plata v. Davis*, 329 F. 3d 1101 (2003).

77. See *supra* note 1; See also Motion to Convene the Three-Judge Panel, *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882 (E.D. Cal. 2006) (No. 01-1351) (filed Nov. 13, 2006); Order Granting Plaintiffs' Motion to Convene Three-Judge Court, *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882 (E.D. Cal. 2006) (No. 01-1351) (filed July 23, 2007).

78. *Coleman*, 922 F.Supp.2d at 887-888 (internal quotations and citations omitted, emphasis in original).

two years.⁷⁹

A. *The State's Response: Increase Capacity by Building More Prisons*

The State's initial political and legal response to the population reduction order was to enact AB 900, a massive \$7 billion prison and jail construction bond.⁸⁰ AB 900 was described by the New York Times as, "the largest single prison construction program in the nation's history."⁸¹ AB 900 also included "prison reform" measures requiring: additional rehabilitation and treatment services for prisoners and parolees; expanded substance abuse treatment services in prisons; prisoner assessments to aid in reentry and reduce recidivism; and increased day treatment and crisis care services for parolees with mental health problems.⁸²

After the passage of AB 900 the *Plata* Receiver, appointed by the federal court to oversee healthcare at CDCR facilities, modified the prison construction plan to include the creation of 10,000 specialized medical and mental health beds.⁸³ But the State, under the leadership of then-Attorney General Edmund G. Brown Jr., reneged on this plan and changed its position in the middle of the 2008 *Coleman/Plata* trial, abandoning the 10,000 specialized bed plan.⁸⁴ The broader prison

79. *Id.* at 1003-4.

80. *See* A.B. 900, 2007-2008 Leg. Reg. Sess. (Cal. 2007) (signed by Governor Schwarzenegger May 3, 2007); *see also* *See Order Granting Plaintiffs' Motion to Convene Three-Judge Court, Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882 at 8 (E.D. Cal. 2006) (No. 01-1351) ("The Court acknowledges that the State has recently attempted to take action to reduce prison crowding through Assembly Bill 900 . . . Even assuming that the provisions of this legislation were to be timely implemented, however—which the Court has doubts about given the history of delays in this case, the highly controversial and political nature of the subject matter, and the conflicts that may sometimes arise between meeting constitutional standards and the tough-on-crime approach to law enforcement espoused by some members of the California Legislature—it is unclear whether the legislation would reduce the impacts of overcrowding in any meaningful way."); *see also* Andy Furillo, *Prison Expansion Plan Shrinks*, SACRAMENTO BEE, June 18, 2008 ("The Schwarzenegger administration offered the AB 900 construction plan as its main line of defense against a legal motion filed by inmates rights lawyers to cap the state's prison population.").

81. Jennifer Steinhauer, *California to Address Prison Overcrowding With Giant Building Program*, NY TIMES, Apr. 27, 2007, available at http://www.nytimes.com/2007/04/27/us/27prisons.html?_r=0.

82. *See* A.B. 900, 2007-2008 Leg. Reg. Sess. (Cal. 2007).

83. *See* Order at 4, *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882 (E.D. Cal. 2008) (No. 01-1351) (filed Feb. 26, 2008) ("The Receiver in *Plata* has begun to implement three separate but related construction projects: . . . The construction of approximately 5,000 additional CDCR medical beds and approximately 5,000 CDCR mental health beds.").

84. *See Plata*, 131 S. Ct. at 1938. ("At the time of the [three-judge] court's decision

expansion plan was also halted, largely a result of the state's budget crisis.⁸⁵ In addition, Brown was running for Governor on a platform that attacked the Receiver and the specialized building plan as wasteful and too fancy for prisoners.⁸⁶ By failing to build new prison beds—as a result of fiscal and political delays—the State severely undermined its primary defense to the population reduction order.⁸⁷

the State had plans to build new medical and housing facilities, but funding for some plans had not been secured and funding for other plans had been delayed by the legislature for years. Particularly in light of California's ongoing fiscal crisis, the three-judge court deemed 'chimerical' any 'remedy that requires significant additional spending by the state.' Events subsequent to the three-judge court's decision have confirmed this conclusion. In October 2010, the State notified the *Coleman* District Court that a substantial component of its construction plans had been delayed indefinitely by the legislature." (citing *v. Schwarzenegger*, 922 F. Supp. 2d 882, 954 (E.D. Cal. 2009)) (internal citations omitted); Transcripts of Proceedings, Tuesday, November, 18, 2008 at 2403, *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882 (E.D. Cal. 2008) (No. 01-1351) (former Assemblyman and Riverside County District Attorney Rodric Pacheco testified that the *Plata* Receiver never received the money necessary to implement his construction plan); *id.* at 2462 (former Assemblyman Todd Spitzer testified, "[T]hat AB 900 could not be implemented because the Attorney General [Edmund G. Brown Jr.] had not issued a clean bond opinion on AB 900" and did not try to persuade the Legislature to move forward); *id.* at 2464 (former Assemblyman Spitzer also testified that the Legislature failed to pass the clean-up legislation that was necessary to fund AB 900 because the Receiver's request for medical beds was part of the package); see also Andy Furillo, *Prison Expansion Plan Shrinks*, SACRAMENTO BEE, June 18, 2008.

85. See MAC TAYLOR, LEG. ANALYST'S OFFICE, CALIFORNIA'S FISCAL OUTLOOK: LAO PROJECTIONS 2007-08 THROUGH 2012-13 (Nov. 14, 2007), available at http://www.lao.ca.gov/2007/fiscal_outlook/fiscal_outlook_07.aspx (since the time the 2007-08 Budget Act was enacted in August 2007, "the 2007-08 budget situation has deteriorated by almost \$6 billion. Under our forecast, absent corrective action, the state would end the current fiscal year with a \$1.9 billion deficit. . . . In addition to a negative carry-in balance from 2007-08, we project the state will face an \$8 billion operating shortfall in 2008-09.").

86. See, e.g., Jerry Brown, *Jerry Brown: Prison Czar's Plan Unrealistic, Intrusive*, SACRAMENTO BEE (Feb. 4, 2009), available at <http://ag.ca.gov/newsalerts/speeches/release.php?id=1695> ("We don't disagree that the state has to provide care that meets constitutional standards and is not cruel and unusual. But constitutional care doesn't mean yoga rooms and music therapy.").

87. *Coleman*, 922 F.Supp. 2d at 952 ("In the first place, AB 900 construction has already been delayed for more than two years due to the absence of funding. . . . As far as we are aware, it remains the case today, eight months later, that there is no funding for AB 900 and no ground has been broken on the AB 900-authorized re-entry facilities. Second, even if funding were secured in the near future, other practical concerns would lead to significant additional delays."); *id.* 954 ("Because the fiscal crisis has required 'severe and significant cuts to vital State programs,' the state refused to enter into any agreement that would 'require[] the State to seek I-Bank funding, or any other additional funding not previously appropriated by the California Legislature.' Although defendants did state that they would use a 'significant' but unspecified portion of the funds allocated by the legislature in AB 900 'to build appropriate beds for inmates with disabilities and/or other health needs,' there is no indication as to when such funds will be made available; when construction might begin; or what part, if any, of the constitutional inadequacies in delivering medical and mental health

Even if the State had been able to increase bed capacity to the levels originally intended under AB 900, that action alone would almost certainly have been insufficient to remedy to the constitutional violations in CDCR facilities. As recounted in the August 2009 three-judge court order, and again later in the 2011 U.S. Supreme Court opinion, overcrowding means that there is a shortage of resources necessary to address the fundamental needs of the incarcerated population.⁸⁸ Said another way, prisons require more than just beds, they also require hospitals and staff—including specialized medical and mental health staff—to meet the medical and mental health needs

care to California inmates might be remedied by such construction.”) (internal citations omitted); *id.* at 951 (E.D. Cal. 2009) (“[W]hat we must determine is not whether building prisons could solve the problem, but whether prison construction offers an actual, feasible, sufficiently timely remedy for the unconstitutional state of medical and mental health care in California’s prisons. Here, California has no plans to construct additional prisons in the near future and has not suggested that it does. As a result, we need not consider further the construction of additional prisons as an alternative remedy.”); *id.* at 953 (“ [W]e conclude that neither the Receiver’s medical facility construction plans nor the proposed AB 900 in-fill beds—prison expansion—can remedy the constitutional violations at issue in *Plata* and *Coleman*. Like the AB 900 re-entry facilities, these proposed facilities will not be realized at any point in the near future. Furthermore, their funding is threatened by the present fiscal crisis, and the proposed construction would in any event likely fall far short of remedying the problems created by the crowding of California’s prisons.”).

88. *Plata*, 131 S. Ct. at 1939 (“[A]bsent a reduction in overcrowding, any remedy might prove unattainable and would at the very least require vast expenditures of resources by the State. Nothing in the long history of the *Coleman* and *Plata* actions demonstrates any real possibility that the necessary resources would be made available.”); *id.* at 1938 (“Construction of new facilities, in theory, could alleviate overcrowding, but the three-judge court found no realistic possibility that California would be able to build itself out of this crisis. . . . even if planned construction were to be completed, the Plata Receiver found that many so-called ‘expansion’ plans called for cramming more prisoners into existing prisons without expanding administrative and support facilities. The former acting secretary of the California prisons explained that these plans would ‘compound the burdens imposed on prison administrators and line staff’ by adding to the already overwhelming prison population, creating new barriers to achievement of a remedy.”) (emphasis added) (internal quotations and citations omitted); *Coleman*, 922 F. Supp. 2d at 954-55 (“On a more fundamental level, the AB 900 in-fill construction plan ‘essentially is a prison expansion measure which increases the number of prison cells without addressing the fundamental structural issues that have caused the crisis and that have created unconstitutional conditions within the prisons.’ ‘[t]he so-called “in-fill” beds will cause more problems than they will solve. Many of California’s prisons are so big that they are effectively unmanageable. Wardens and other administrators spend much of their time responding to crises, rather than fulfilling their responsibilities to provide adequate medical and mental health care. Unless these in-fill beds stand alone with their own administrative and support facilities, adding thousands of additional prisoners to already overburdened facilities will only compound the burdens imposed on prison administrators and line staff.’ . . . Thus, while the construction of in-fill beds would reduce the use of ‘bad beds,’ the principal effects of the overcrowding in California’s prisons would remain unaddressed.”) (internal citations omitted).

of the prisoners they house.⁸⁹

*B. The U.S. Supreme Court's Decision in Brown v. Plata*⁹⁰

On May 23, 2011, in *Brown v. Plata*,⁹¹ the U.S. Supreme Court agreed that overcrowding in California's prisons created conditions that violated the Eighth Amendment's prohibition against cruel and unusual punishment.⁹² The Court upheld the three-judge court's order requiring the CDCR to decrease overcrowding to no more than 137.5 percent of design capacity,⁹³ amounting to a reduction of approximately 33,000 prisoners,⁹⁴ by December 31, 2013.⁹⁵ These numbers did not account

89. *Coleman*, 922 F.Supp. 2d at 962 (“The evidence establishes that ‘[r]educing the population in the system to a manageable level is the only way to create an environment in which other reform efforts, including strengthening medical management, hiring additional medical and custody staffing, and improving medical records and tracking systems, can take root in the foreseeable future.’ Other forms of relief are either unrealistic or depend upon a reduction in prison overcrowding for their success. Accordingly, we find, by clear and convincing evidence, that no relief other than a prisoner release order is capable of remedying the constitutional deficiencies at the heart of these two cases.”) (internal citations omitted); *Plata*, 131 S. Ct. at 1938 (“[A]bsent a population reduction, continued efforts by the Receiver and Special Master would not achieve a remedy.”); *id.* at 1939 (“Without a reduction in overcrowding, there will be no efficacious remedy for the unconstitutional care of the sick and mentally ill in California's prisons.”).

90. For a thorough and thoughtful analysis of the Supreme Court's decision and the litigation leading up to it, see Ken Strutin, *The Realignment of Incarcerative Punishment: Sentencing Reform and the Conditions of Confinement*, 38 WM. MITCHELL L. REV. 1313, 1324–38 (2012) (because prison overcrowding resulted in Constitutionally inadequate medical and mental health conditions, the Court ordered the CDCR to reduce overcrowding as a mechanism for remedying the medical and mental health violations). See also, JOAN PETERSILIA, SARA ABARBANEL, JOHN S. BUTLER, MARK FELDMAN, MARIAM HINDS, KEVIN E. JASON, CORINNE KEEL, MATT J. OWENS, AND CAMDEN VILKIN, VOICES FROM THE FIELD: HOW CALIFORNIA STAKEHOLDERS VIEW PUBLIC SAFETY REALIGNMENT (Jan. 1, 2014), at 12–16, [hereinafter VOICES FROM THE FIELD], available at <http://www.law.stanford.edu/sites/default/files/child-page/183091/doc/slspublic/Petersilia%20VOICES%20no%20es%20Final%20022814.pdf>.

91. 131 S. Ct. 1910, 1923, 1947 (2011).

92. *Id.*

93. Design capacity is not a static concept; as the CDCR constructs new housing, the institutions' design capacity increases. For example, as of December 5 2012, CDCR institutions were designed to hold 79,756 people; however, they were actually holding 119,741 or 150.1 percent of design capacity. See Status Report at Exhibit A, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2013) (No. 4271-1).

94. See *State Responds to Three-Judge Court's Order supra*, note 6 (stating that at the time of the Supreme Court's decision there were approximately 143,000 prisoners in the CDCR's 33 facilities, which were designed to hold 79,8588 individuals); *Plata*, 131 S. Ct. at 1943–47 (holding that the CDCR must reduce its prisoner population to 137.5 percent of design capacity).

95. See *Plata*, 131 S. Ct. at 1923, 1947; Opinion and Order Denying Defendants' Motion to Vacate or Modify Population Reduction Order at 2, *Plata v. Brown*, 922 F. Supp.

for the 8,883 prisoners then housed in four out-of-state private prisons on an emergency basis.⁹⁶

III. THE STATE'S INITIAL RESPONSE TO BROWN V. PLATA: PUBLIC SAFETY REALIGNMENT

By 2011, when the Supreme Court decided *Plata*, the state's finances were in far worse condition than when it had enacted AB 900 two years earlier. Given new fiscal constraints, including a twenty billion dollar annual budget deficit,⁹⁷ the State could not satisfy the Supreme Court's order by simply building more prisons to increase overall capacity.⁹⁸ Instead, the "cornerstone" of the State's plan to

2d 1004 (E.D. Cal. 2013) (No. 4271-1) (although the State originally had two years from time of the Supreme Court judgment to meet its goal, the three-judge court extended the date for compliance to December 31, 2013). *See also* Declaration of James Austin in Support of Plaintiffs' Statement in Response to October 11, 2012 Order Regarding Population Reduction, *supra* note 18, at 2 (showing that there were 8,883 CDCR prisoners house out-of-state in December 2012).

96. The housing of prisoners in out-of-state prisons was permitted by a "state of emergency proclamation" issued by Governor Schwarzenegger in 2006 due to the level of crowding in the CDCR prisons. *See* Declaration of James Austin in Support of Plaintiffs' Statement in Response to October 11, 2012 Order Regarding Population Reduction, *supra* note 18, at 2; *Prison Overcrowding State of Emergency Proclamation*, CAL. OFFICE OF GOVERNOR (Oct. 4, 2006), <http://gov.ca.gov/news.php?id=4278>. The proclamation allowed California inmates to be housed in out-of-state prisons. *Id.* However, the proclamation was terminated by the Governor in January 2013; thus, doing away with the State's legal authority to keep prisoners in out-of-state facilities. *See Proclamation Terminating the Prison Overcrowding Proclamation*, CAL. OFFICE OF GOVERNOR (Jan. 8, 2013), available at <http://www.cdcr.ca.gov/News/docs/3JP-docs-01-07-13/Terminating-Prison-Overcrowding-Emergency-Proclamation-10-4-06.pdf>. The Governor renewed the State's legal authority to keep California prisoners in out-of-state facilities by signing SB 105 into law in September 2013. S.B. 105, *supra* note 11 (discussed *infra* in Section IV.A.). In addition, in its February 2014 Order, the three-judge court granted the State authority to maintain current levels of prisoners housed in out-of-state facilities. *See* Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013 Deadline, *supra* note 20, at 2. The State was thus granted authority to send California prisoners out-of-state only to replace prisoners released from custody or returning to California, not to increase the total number of inmates house in out-of-state facilities. *Id.*

97. *See* THE 2011-12 BUDGET: CALIFORNIA'S FISCAL OUTLOOK *supra* note 9.

98. It is worth noting that as of 2013, with Proposition 30's passage and increased revenues, along with many cycles of social service cuts, Governor Brown now says budget deficit is erased. *See* CAL. OFFICE OF GOVERNOR, 2013-14 GOVERNOR'S BUDGET SUMMARY I (Jan. 10, 2013), available at http://www.dof.ca.gov/documents/FullBudgetSummary_web2013.pdf [hereinafter GOVERNOR'S BUDGET]; *Governor Brown Delivers 2013 State of the State Address*, CAL. OFFICE OF GOVERNOR (Jan. 24, 2013), <http://gov.ca.gov/news.php?id=17906>; CAL. LEG. ANALYST'S OFFICE, THE 2013-14 BUDGET: OVERVIEW OF THE GOVERNOR'S BUDGET 3, 5 (Jan. 2013), available at <http://www.lao.ca.gov/Publications/Detail/2681>. As a practical and political matter, however, the State is unlikely to embark upon a new prison construction

comply with the Supreme Court's *Plata* mandate was Realignment.⁹⁹

A. *The Nuts and Bolts of Realignment*¹⁰⁰

Realignment made three key changes to California's criminal justice administration:

- 1) Most individuals newly convicted of low-level, non-serious felonies stay at the county level. Most individuals sentenced for a non-serious, non-violent, non-sex-registerable felony offense (a "non-non-non"), and who have no such prior convictions, now remain under the jurisdiction of the county—in jail or under some other form of local supervision—rather than being sent to state prison.¹⁰¹
- 2) Counties assume greater post-release supervision responsibilities. Starting October 1, 2011, those released from prison whose current convictions were for non-serious, non-violent felonies and who are not deemed high risk sex offenders¹⁰² are placed on a new form of local monitoring called "post-release community supervision" ("PRCS") under the supervision of county probation.¹⁰³ Technical violations by any individual on supervision, whether by a county or state agency, will be served in county jail and only new felony

boom, as evidenced by the Governor's proposed 2013 budget which provides only a minimal increase in funding for the CDCR. *See id.*

99. *See State Responds to Three-Judge Court's Order*, *supra* note 6 (CDCR Secretary Matthew Cate stating "AB 109 is the cornerstone of the solution [to address overcrowding], and the Legislature must act to protect public safety by funding Realignment."). *See also* Governor Brown Pledges State Support as Local Leaders Launch Realignment, *available at* <http://gov.ca.gov/news.php?id=17245> (Quoting Governor Brown, "The U.S. Supreme Court has ordered California to reduce its prison population without delay and realignment is the most viable plan to comply with the Court's order.").

100. For a detailed description of the Realignment legislation, *see* JOAN PETERSILIA, ET AL., VOICES FROM THE FIELD, *supra* note 90, at 23–25.

101. CAL. PENAL CODE § 1170.

102. CDCR Parole completes a risk assessment for all persons who are required to register as sex offenders, pursuant to Cal. Penal Code § 290, in order to determine whether they are to be identified as "high risk sex offenders." *See Implementation of the Post Release Community Supervision Act of 2011*, CAL. DEP'T OF CORR. & REHAB. (Aug. 29, 2011), *available at* <http://www.cdcr.ca.gov/realignment/docs/PRCS-County.pdf>.

103. CAL. PENAL CODE §§ 3450–65. *See id.* § 3451 (providing that inmates released from state prison after October 1, 2011 for a non-violent, non-serious, nonsexual offense be supervised by the county for a period of not more than three years). Whether an individual is subject to Post Release Community Supervision is controlled by the individual's most recent offense; prior serious, violent, or sex-related felony convictions other than the latest offense are not taken into account for purposes of assigning offenders to PRCS.

offenses will return an individual to state prison.¹⁰⁴ Counties have broad discretion to sanction PRCS violators in jails or through non-custodial alternatives, such as electronic monitoring or substance-abuse treatment.¹⁰⁵

Realignment was prospective only from its October 1, 2011 effective date and did not provide for the transfer or early release of any inmates already serving sentences in state prison. In addition, anyone on parole before October 1, 2011 remains under state jurisdiction until discharged by the CDCR.¹⁰⁶

- 3) The Legislature explicitly encouraged counties to use evidence-based alternatives to incarceration. As we discuss further in Section V, *infra*, Realignment did not change the length of sentences that can be imposed for the “realigned” offenses, the applicability of sentencing enhancements, or the fact that these offenses remain felonies. But the legislation did encourage counties to develop community-based alternatives to incarceration for these low-level crimes, rather than simply incarcerating the realigned population in local jails for the same period of time they would have previously served in state prison.¹⁰⁷ The legislation also granted county sheriffs additional discretion to manage their jail populations through use of intermediate alternative sanctions other than incarceration or traditional probation supervision.¹⁰⁸

104. See CAL. PENAL CODE § 3458 (“No person subject to this title shall be returned to prison for a violation of any condition of the person’s postrelease supervision agreement.”); CAL. PENAL CODE § 3452(b)(3) (“An advisement that if a person breaks the law or violates the conditions of release, he or she can be incarcerated in a county jail regardless of whether or not new charges are filed.”); CAL. PENAL CODE § 3455(a)(1)-(2), (d) (limiting penalties for each PRCS violation to no more than 180 days in county jail.).

105. *Id.* § 3455

106. See *id.* § 3000.09.

107. See *id.* § 17.5(a).

108. See *id.* § 17.5(a)(3); *id.* § 1230.1(d) (explicitly providing that, “[c]onsistent with local needs and resources, the [Realignment implementation] plan may include recommendations to maximize the effective investment of criminal justice resources in evidence-based correctional sanctions and programs, including, but not limited to, day reporting centers, drug courts, residential multiservice centers, mental health treatment programs, electronic and GPS monitoring programs, victim restitution programs, counseling programs, community service programs, educational programs, and work training programs.”); *id.* § 1203.018 (authorizing counties to offer electronic monitoring for inmates being held in lieu of bail in county jail); *id.* § 3450 (authorizing a range of incarceration alternatives).

The legislative intent of Realignment implicitly acknowledged that counties are able to integrate public health and social services as part of rehabilitation and reentry in ways that the state cannot.¹⁰⁹ The legislation created a “split sentencing” option, which allows a judge to split the sentence for an eligible non-non-non defendant between jail time and a period of time in the community under the supervision of the county probation department.¹¹⁰ This concluding period served under probation is known as mandatory supervision.¹¹¹ This practice safely reduces the jail population and gives counties an opportunity to supervise convicted individuals after their release.¹¹² Realigned individuals serving their entire sentences in jail receive no post-release supervision at all.¹¹³

B. Realignment’s Potential: A Paradigm Shift in How Government Addresses Low-level, Non-Violent Crime

If Realignment did nothing more than move tens of thousands of prisoners from state-run prisons to county-run jails, few would suggest it represented a paradigm shift in criminal justice policy. The Governor and the Legislature made clear, however, that they intended Realignment to do far more than simply shift the location of incarceration for the specified low-level offenses.¹¹⁴ The legislation explicitly encourages counties to develop and implement programs

109. See, e.g., Marissa Lagos, *Gov. Jerry Brown Promises Constitutional Amendment to Fund Realignment*, SF GATE (Sept. 21, 2011), <http://blog.sfgate.com/nov05election/2011/09/21/gov-jerry-brown-promisesconstitutional-amendment-to-fund-realignment/> (“The governor and other supporters believe that city police and county sheriffs, probation departments and social service programs will do a better job helping low-level offenders stay out of trouble.”). See also *What They’re Saying...*, CAL. DEP’T OF CORR. & REHAB., <http://www.cdcr.ca.gov/realignment/what-theyre-saying.html> (compiling comments from local government officials from around the state concurring that local governments can do a better job than the State, including San Mateo County Sheriff Greg Munks who explained “[k]eeping individuals closer to the community, keeping them closer to their families, and connecting them with community-based resources that they’re going to need to be successful when they get out, because they are going to get out.”).

110. CAL. PENAL CODE § 1170(h)(5)(B).

111. See *Mandatory Supervision: The Benefits of Evidence Based Supervision under Public Safety Realignment*, CHIEF PROBATION OFFICERS OF CAL. ISSUE BRIEF (Winter 2012), available at <http://www.cpoc.org/assets/Realignment/issuebrief2.pdf> [hereinafter *Mandatory Supervision*]; *California Realignment Dashboard*, *supra* note 14.

112. See CAL. PENAL CODE § 1170(h)(5)(A) (also allowing judges to sentence individuals convicted of low-level felonies to serve their full terms in jail, with absolutely no post-release supervision).

113. *Id.*

114. See *id.* § 17.5(a).

drawing on cooperation among public health and social service agencies and non-governmental community organizations.¹¹⁵ In stark contrast to the preceding decades of tough-on-crime politics and California's existing harsh sentencing laws discussed above in Section I, the articulated legislative intent declared a new focus on rehabilitating rather than just punishing those convicted only of non-serious, non-violent offenses.¹¹⁶

The formal legislative findings and declarations state that, “[c]riminal justice policies that rely on building and operating more prisons to address community safety concerns are not sustainable, and will not result in improved public safety.”¹¹⁷ The legislation urges counties to employ “evidence-based strategies” and “community-based punishment”¹¹⁸ for low-level, non-violent offenses rather than relying primarily on incarceration in state prisons or county jails.¹¹⁹ And the

115. *Id.* § 1170(h)(5)(A).

116. *Id.*

117. *Id.*

118. *See id.* §§ 17.5(a), 1170(h), 1230.1(d) (explicitly providing that, “[c]onsistent with local needs and resources, the [Realignment implementation] plan may include recommendations to maximize the effective investment of criminal justice resources in evidence-based correctional sanctions and programs, including, but not limited to, day reporting centers, drug courts, residential multiservice centers, mental health treatment programs, electronic and GPS monitoring programs, victim restitution programs, counseling programs, community service programs, educational programs, and work training programs.”); *id.* § 1203.018 (authorizing counties to offer electronic monitoring for inmates being held in lieu of bail in county jail); *id.* § 3450 (authorizing a range of incarceration alternatives). Section 17.5 defines “community-based punishment” as “correctional sanctions and programming encompassing a range of custodial and noncustodial responses to criminal or noncompliant offender activity.” Examples of community-based punishment include: intensive community supervision; home detention with non-GPS electronic monitoring (such as telephone check-ins) or GPS monitoring; mandatory community service; restorative justice programs such as mandatory victim restitution and victim-offender reconciliation; work, training, or education in a furlough program, or work, in lieu of confinement, in a work release program; day reporting; residential or nonresidential substance abuse treatment programs; mother-infant care programs; and community-based residential programs offering structure, supervision, drug treatment, alcohol treatment, literacy programming, employment counseling, psychological counseling, mental health treatment, or any combination of these and other interventions.

119. *See* THE PEW CENTER ON THE STATES, STATE OF RECIDIVISM APRIL 2011: THE REVOLVING DOOR OF AMERICA'S PRISONS 26 (Apr. 2011), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revolving_Door_America_Prisons_percent20.pdf (table comparing state recidivism rates); CAL. PENAL CODE § 17.5 (“California must reinvest its criminal justice resources to support community-based corrections programs and evidence-based practices Realigning low-level felony offenders who do not have prior convictions for serious, violent, or sex offenses to locally run community-based corrections programs, which are strengthened through community-based punishment, evidence-based practices,

Legislature further acknowledged that, “[d]espite the dramatic increase in [state] corrections spending over the past two decades, reincarceration rates . . . remain unchanged or have worsened”¹²⁰ Indeed, California’s state prison recidivism rate—61 percent as of January 2014¹²¹—is among the highest in the nation.¹²² Prior to Realignment’s enactment, more than 10,000 people completed their sentences and were released from state prison each month in California.¹²³ However, another approximately 10,000 people each month replaced them.¹²⁴ California’s prisons had all but turned the metaphorical “revolving door” into a literal one.

The stated intent of Realignment is to interrupt this cycle by preventing crime, limiting future victims, and more effectively allocating resources.¹²⁵ The legislation urges counties 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.”¹²⁶ It encourages counties to use “evidence-based strategies” that are demonstrated to reduce recidivism rates, often dramatically,¹²⁷ and “community-based punishment” to reduce crime.¹²⁸ It is primarily focused on reducing re-

improved supervision strategies, and enhanced secured capacity, will improve public safety outcomes among adult felons and facilitate their reintegration back into society. Community based corrections programs require a partnership between local public safety entities and the county to provide and expand the use of community-based punishment for low-level offender populations. Each county’s Local Community Corrections Partnership . . . should play a critical role in developing programs and ensuring appropriate outcomes for low-level offenders.”).

120. *Id.*

121. See CAL. DEP’T OF CORR. & REHAB., 2013 OUTCOME EVALUATION REPORT 11–12 (Jan. 2014), *available at* http://www.cdcr.ca.gov/Adult_Research_Branch/Research_Documents/Outcome_Evaluation_Report_2013.pdf.

122. *Id.*; see also THE PEW CENTER ON THE STATES, *supra* note 119, at 10–11.

123. In 2010, the last full year before realignment was implemented, 62,003 inmates were released on their first parole, 58,716 were released on re-parole, and 2,537 were discharged from CDCR facilities. Thus, on average, over 10,000 inmates were released from a California state prison each month. CAL. DEP’T OF CORR. & REHAB., MOVEMENT OF PRISON POPULATION CALENDAR YEAR 2010, at 3 (Jan. 2011), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual_Move5/Move5d2010.pdf.

124. *Id.*

125. CAL. PENAL CODE § 17.5(a).

126. *Id.*

127. See THE PEW CENTER ON THE STATES, *supra* note 119, at 26.

128. Section 17.5 defines “community-based punishment” as “correctional sanctions and programming encompassing a range of custodial and noncustodial responses to criminal or

offending by individuals already involved in the criminal justice system—those who have been or who are at risk of walking through that revolving door. Realignment aims to “improve public safety outcomes among adult felons and facilitate their reintegration back into society.”¹²⁹

C. Realignment’s Limitations

Remarkable and ambitious as Realignment’s potential may be, the results thus far have been decidedly mixed. As we discuss below in Section V, after nearly three years and a constitutional amendment to increase funding for its implementation, it is now clear that Realignment, in its current form, will never be enough to reduce the state prison population sufficiently to comply with the *Plata* mandate.¹³⁰ In this Section we examine, and propose solutions to, four related and significant problems that have limited Realignment’s effectiveness in reducing the prison population and its potential to usher in a new criminal justice paradigm.

1. Realignment Left Individual Counties Too Much Discretion to Incarcerate

Realignment left individual counties too much discretion to incarcerate persons convicted of “realigned” offenses in local jails, rather than utilize alternatives to incarceration. The prison overcrowding problem cannot be separated from the problem of overcrowded county jails. Given that the State’s primary response to the *Plata* order is to divert tens or hundreds of thousands of people—who would previously have been sent to state prison—to county correctional systems, Realignment cannot succeed unless there is room

noncompliant offender activity.” Examples of community-based punishment include: intensive community supervision; home detention with non-GPS electronic monitoring (such as telephone check-ins) or GPS monitoring; mandatory community service; restorative justice programs such as mandatory victim restitution and victim-offender reconciliation; work, training, or education in a furlough program, or work, in lieu of confinement, in a work release program; day reporting; residential or nonresidential substance abuse treatment programs; mother-infant care programs; and community-based residential programs offering structure, supervision, drug treatment, alcohol treatment, literacy programming, employment counseling, psychological counseling, mental health treatment, or any combination of these and other interventions.

129. CAL. PENAL CODE § 17.5(a).

130. See Defendant’s Motion to Vacate or Modify Population Reduction Order, *supra* note 5 at 2. See Declaration of Jeffrey Beard, Ph.D., In Support of Defendants’ Motion to Vacate or Modify Population Reduction Order at 7, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2013) (No. 01-1351).

at the county-level to absorb these prisoners. County jails throughout the state, however, were themselves overcrowded when Realignment was enacted.¹³¹ Since then, overcrowding has persisted or gotten worse in many counties.¹³² In addition, many of the same counties that historically sent disproportionately more people to state prison for low-level felony offenses are demanding additional funding to expand jail capacity in order to implement Realignment, rather than expanding the rehabilitative alternatives the Legislature intended to encourage.¹³³

County officials are clearly crucial to making Realignment successful. As Santa Clara Law Professor W. David Ball has noted:

California is one state; it is also fifty-eight counties. When it comes to criminal justice and the state prison population, localities are where the action is. County criminal justice budgets are much larger than prison budgets, county officials make most of the key decisions, and county responses to crime—not crime itself—drive new felon admission rates.¹³⁴

And yet there is an inherent tension between the legislative intent articulated in the Realignment legislation¹³⁵ and the stated goal of Realignment: to “[p]rovide as much flexibility as possible to the level of government providing the service.”¹³⁶ Although it makes sense for the state to provide counties with some amount of discretion over how they implement Realignment in their respective jurisdictions, the legislation—with its lack of mandates, accountability mechanisms, or funding incentives—sacrifices Realignment’s full potential in the name of county autonomy and flexibility.¹³⁷

131. At least twenty counties already operate under court-ordered population caps. See CAL. BD. OF CORR., JAIL PROFILE SURVEY ANNUAL REPORT 2004 7 (2004), available at http://www.bdcorr.ca.gov/fsod/jail%20profile%20summary/2004/2004_annual_report/2004_JPS_Annual_Report.pdf [hereinafter JPS] (“According to the JPS [Jail Population Survey], of the current 62 jurisdictions, 24 have court-ordered population caps. Those 24 jurisdictions operate 67 facilities of which 58 have population caps. The 58 facilities with population caps house 66.5% of the state’s ADP [or average daily state prison population].”).

132. *Id.*

133. See CAL. PENAL CODE §17.5(a).

134. 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, 1078 (2012).

135. See CAL. PENAL CODE § 17.5(a) (codifying realignment’s legislative intent; recognizing that “building and operating more prisons to address community safety concerns [is] not sustainable, and will not result in improved public safety” and that “California must reinvest its criminal justice resources to support community-based corrections programs and evidence-based practices”).

136. See GOVERNOR’S BUDGET, *supra* note 98, at 72.

137. Regarding the broad discretion Realignment grants to counties, see ABARBANEL,

For Realignment to succeed, the state must more effectively oversee county Realignment programs and incentivize counties to implement Realignment in a manner consistent with the legislative intent and objectives underlying the legislation. Because counties have largely been allowed to make their own decisions about whether to embrace Realignment's evidence-based approach and alternatives to incarceration, many counties continue to rely upon incarceration as the primary response to low-level, non-violent crime.¹³⁸

2. *The State Failed to Include Sufficient Evaluation and Accountability Mechanisms*

The Realignment legislation lacks sufficient standardized data collection and reporting requirements. The legislature tasked a state agency, the Board of State and Community Corrections ("BSCC"), with overseeing the implementation of Realignment, but left its specific role and duties largely undefined.¹³⁹ Although the BSCC's broad

supra note 4 ("Not only did AB 109 transfer an unprecedented amount of responsibility to counties; it also gave them an unprecedented amount of discretion. The bill puts few limits on how counties can spend their money, and it does not require them to report any results to the state or to measure the outcomes of their programs. There are two explanations for this grant of discretion: (1) It may have been necessary to get law enforcement buy-in to the bill, and (2) There is some evidence that counties may be better situated to make decisions about how to handle offenders in their jurisdictions.".) See also REBECCA SULLIVAN SILBERT, SENIOR LEGAL POLICY ASSOCIATE, THE CHIEF JUSTICE EARL WARREN INSTITUTE ON LAW AND SOCIAL POLICY, UNIVERSITY OF CALIFORNIA, BERKELEY, SCHOOL OF LAW, *THINKING CRITICALLY ABOUT REALIGNMENT IN CALIFORNIA* (Feb. 2012), available at https://www.law.berkeley.edu/files/bccj/Thinking_Critically_3-14-2012.pdf ("[R]ealignment legislation contains no requirement that counties offer community supervision, treatment, reentry services, or any other alternative. There is no state oversight of realignment funding, and the money is unrestricted beyond the fact that it must be used for realignment-related expenses. The hope of many is that counties will take advantage of this opportunity to explore noncustodial options and community programs that keep people from committing new crimes, thus creating better communities for all Californians. . . . [H]owever, nothing in the state legislation stops counties from relying solely on increased jail construction, which would be an opportunity wasted.").

138. See generally ACLU OF CAL., PUBLIC SAFETY REALIGNMENT: CALIFORNIA AT A CROSSROADS app. A (2012), available at https://www.aclunc.org/docs/criminal_justice/public_safety_realignment_california_at_a_crossroads.pdf [hereinafter CROSSROADS]; ANGELA MCCRAY ET AL., REALIGNING THE REVOLVING DOOR? AN ANALYSIS OF CALIFORNIA'S COUNTIES' AB 109 IMPLEMENTATION PLANS (DRAFT) 7–8 (Jan. 2012), available at http://www.law.stanford.edu/sites/default/files/child-page/183091/doc/slspublic/Realigning_the_Revolving_Door.pdf.

139. MAC TAYLOR, LEG. ANALYST'S OFFICE, THE 2012–13 BUDGET: THE 2011 REALIGNMENT OF ADULT OFFENDERS—AN UPDATE 13 (Feb. 22, 2012), available at http://www.lao.ca.gov/analysis/2012/crim_justice/2011-realignment-of-adult-offenders-

mission is to collect and disseminate data and information, provide technical assistance to counties, and offer leadership in the area of criminal justice policy, there is nothing in the Realignment legislation specifying how the BSCC is to function, what data it is to collect, or how it is to compel counties' to report these data.¹⁴⁰ Without mandated data collection, policy-makers are unable to monitor which policies are working to reduce recidivism and reliance on incarceration, and then to base future policy and budget decisions accordingly.

There have been some encouraging developments over the past two years toward creating a more effective data collection, monitoring, and dissemination role for the BSCC. In 2012, the state's Legislative Analyst's Office recommended that the Legislature direct the BSCC to create a working group "made up of representatives of the state, counties, and the broader research community," to focus on: "(1) identifying the handful of key outcome measures that all counties should collect, (2) clearly defining these measures to ensure that all counties collect them uniformly, and (3) developing a process for counties to report the data and for BSCC to make the data available to the public."¹⁴¹

In 2013, the legislature enacted AB 1050, which requires the BSCC to work with relevant stakeholders such as probation chiefs, the Administrative Office of the Courts, and state sheriffs to develop "definitions of specified key terms in order to facilitate consistency in local data collection, evaluation, and implementation of evidence-based programs."¹⁴² Additionally, the Budget Act of 2013¹⁴³ appropriated \$7,900,000 for the BSCC to allocate to counties that submitted, by December 15, 2013, a report providing the BSCC information about the county's implementation of its local realignment plan, including "progress in achieving outcome measures as identified in the plan or otherwise available."¹⁴⁴ In the same year, the BSCC also announced a

022212.pdf [hereinafter THE 2011 REALIGNMENT OF ADULT OFFENDERS].

140. *Id.*

141. THE 2011 REALIGNMENT OF ADULT OFFENDERS, *supra* note 139, at 19.

142. *Legislative Analyst's Digest*, A.B. 1050, 2013–2014 Leg., Reg. Sess. (Cal. 2013), available at http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1001-1050/ab_1050_bill_20130909_chaptered.pdf.

143. A.B. 110, 2013–2014 Leg., Reg. Sess. (Cal. 2013), available at http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0101-0150/ab_110_bill_20130627_chaptered.pdf.

144. BD. FOR STATE AND CMTY. CORR., 2011 PUBLIC SAFETY REALIGNMENT ACT: REPORT ON THE IMPLEMENTATION OF COMMUNITY CORRECTIONS PARTNERSHIP PLANS 1 (June 2013), available at http://www.bscc.ca.gov/download.php?f=/Report_on_the_Implementation_of_Community_

collaborative research project with the Public Policy Institute of California (“PPIC”). PPIC is working with ten counties and state agencies to develop an individual-level data tracking system and help build capacity at the BSCC and the counties to identify effective local criminal justice system practices.¹⁴⁵

In spite of these encouraging steps, however, the state’s continued failure to adequately monitor and report on county-level implementation is significantly undermining Realignment’s effectiveness. In a 2013 report, the LAO noted continued deficiencies in the BSCC’s data collection and reporting:

The Legislature gave BSCC the mission of providing technical assistance to counties with the goal of encouraging evidence-based programs that improve criminal justice outcomes cost-effectively. . . . BSCC has not yet played an active role in facilitating the adoption of evidence-based programs. . . . [W]e believe more is required in order to fulfill the Legislature’s intent when giving BSCC its technical assistance mission, which was to proactively encourage and facilitate the adoption of evidence-based practices across the state. . . . [W]hile BSCC’s existing survey data provide some useful, basic statistics about jail populations, the data are otherwise incomplete. The surveys do not collect much information on local agencies’ outcomes, such as completion rates for treatment programs or offender recidivism rates. In addition, the survey addendum related to realignment is limited because it does not collect the full range of caseload information that would help to assess realignment’s effects. . . . We are also concerned that BSCC has not yet developed a longer-term plan to fulfill its data collection mission.¹⁴⁶

Corrections_Partnership_Plans.pdf.

145. According to testimony provided by PPIC Research Fellow Ryken Grattet, “PPIC researchers will work with the BSCC staff and 10 counties to gather the kind of data that will allow us to take a very close look at the evolving realigned population. Beyond anything that can be done now, this project will allow the state to see what is working and what isn’t and why.” *The Need for Public Safety Data Collection: Hearing before the California Senate Budget and Fiscal Review Subcommittee No. 5 on Corrections, Public Safety, and The Judiciary* (Mar. 20, 2013), available at <http://www.ppic.org/main/testimony.asp?i=1339>.

146. MAC TAYLOR, LEG. ANALYST’S OFFICE, THE 2013–14 BUDGET: GOVERNOR’S CRIMINAL JUSTICE PROPOSALS (Feb. 15, 2013), available at: http://www.lao.ca.gov/analysis/2012/crim_justice/2011-realignment-of-adult-offenders-022212.pdf. See also Brian Goldstein, *Big Government Must Embrace Big Data*, CTR. ON JUVENILE AND CRIMINAL JUSTICE (Nov. 19, 2013), available at <http://www.cjcj.org/news/6956> (noting problems with the BSCC’s data collection and reporting concerning juvenile justice block grant funds).

As Republican state Assemblywoman Melissa Melendez stated at an April 2014 PPIC-sponsored panel discussion that also included Senate President Pro Tem Darrell Steinberg and Matthew Cate, head of the California State Association of Counties and former Secretary of the CDCR, “We have a lot of programs out there. Nobody seems to be able to tell me do they work. There has been no analysis.”¹⁴⁷

3. *The State’s Realignment Funding Formula Failed to Sufficiently Incentivize Counties to Rely Less on Incarceration*

The BSCC noted in a June 2013 report that, “[t]he passage of Proposition 30 in 2012 established a dedicated revenue stream to fund public safety services realigned to local government. In fiscal year 2011–12 and fiscal year 2012–13 respectively, counties received \$354,300,000 and \$842,900,000 statewide for community corrections programs to support the implementation of public safety realignment. In fiscal years 2011–12 and 2012–13, \$7,850,000 was allocated to counties to support each local Community Corrections Partnership’s (CCP) efforts in developing a local plan for the implementation of realignment.”¹⁴⁸

However, the state has not implemented a system for allocating these Realignment funds that incentivizes counties to reinvest resources into alternatives to incarceration and to reduce rates of recidivism.¹⁴⁹ Instead, it has distributed Realignment implementation funds in a way that rewards those counties that have historically relied most heavily on incarceration.¹⁵⁰ Rather than allocate funding based on the county’s

147. Brad Branan, *California Lawmakers Want More Data on Prison Realignment*, SACRAMENTO BEE CAPITOL ALERT (Apr. 21, 2014), available at <http://blogs.sacbee.com/capitolalertlatest/2014/04/california-lawmakers-want-more-data-on-prison-realignment.html#storylink=cpy>.

148. BD. FOR STATE AND CMTY. CORR., 2011 PUBLIC SAFETY REALIGNMENT ACT: REPORT ON THE IMPLEMENTATION OF COMMUNITY CORRECTIONS PARTNERSHIP PLANS, *supra* note 144, at 1.

149. See LEG. ANALYST’S OFFICE, PUBLIC SAFETY REALIGNMENT FUNDING ALLOCATION (May 12, 2014) at 4-5, available at <http://budgettrack.blob.core.windows.net/btdocs2014/481.pdf> [hereinafter PUBLIC SAFETY REALIGNMENT FUNDING ALLOCATION] (“[T]he current allocation method does not necessarily provide an incentive for counties to achieve outcomes that are consistent with legislative priorities.” The funding formula “impacts the success or failure of the realignment of felony offenders, as well as the state’s ability to achieve certain policy goals (such as reducing recidivism among realigned offenders and complying with the federal court ordered prison population cap).”).

150. See DEAN MISZYNSKI, RETHINKING THE STATE-LOCAL RELATIONSHIP: CORRECTIONS 27–28 (Aug. 2011), available at http://www.ppic.org/content/pubs/report/R_811DMR.pdf. See also CAL. DEP’T OF

overall crime rates and public safety needs, or upon counties' demonstrated willingness and ability to employ cost-effective alternatives to incarceration, the state's funding allocation formula has been based predominately on the rate at which each individual county historically sent people to state prison for low-level, non-violent felonies.¹⁵¹ Thus, the higher the past incarceration rate, the higher that county's piece of the funding pie.

In the first fiscal year of Realignment, sixty percent of each county's funding allocation was based on the county's historical average daily state prison population ("ADP") of persons convicted of low-level, non-violent offenses from the particular county; thirty percent was based on the population of each county; and only ten percent was based on each county's demonstrated success at improving the outcomes of individuals on probation.¹⁵² In the second and third years of Realignment, fiscal year 2012–13 and 2013–14, counties were given the best result among three options in which funding was based on: 1) the county's adult population ages 18 to 64; 2) the status quo formula of fiscal year 2011–12; or 3) weighted ADP.¹⁵³ Over a quarter of counties benefited from the new weighted ADP option, in some cases almost doubling what they would have received had their allocation been based on county population.¹⁵⁴

The funding formula for year one, and that for years two and three, provided proportionally more dollars to those counties—such as

FINANCE, 2011–2012 STATE BUDGET 2 (June 30, 2011), available at <http://2011-12.archives.ebudget.ca.gov/pdf/Enacted/BudgetSummary/FullBudgetSummary.pdf>.

151. CAL. STATE ASS'N OF COUNTIES, AB 109 ALLOCATIONS: RECOMMENDED APPROACH FOR 2012–13 AND 2013–14 10 (May 14, 2012), available at http://www.csac.counties.org/sites/main/files/file-attachments/12.05.15_ab_109_allocation-051412_briefing_on_yrs_2_and_3_formula.pdf [hereinafter AB 109 ALLOCATIONS]; PUBLIC SAFETY REALIGNMENT FUNDING ALLOCATION *supra* note 149 at 2-3.

152. See THE 2011 REALIGNMENT OF ADULT OFFENDERS, *supra* note 139, fig.5. The last component of the formula refers to Senate Bill 678, also known as the California Community Corrections Performance Incentives Act, which in 2009 created a fiscal incentive for counties to improve probation outcomes. See S.B. 678, 2009–2010 Leg., Reg. Sess. (Cal. 2009); CAL. PENAL CODE §§ 1228, 1233.4; CHIEF PROBATION OFFICERS OF CAL., SB 678 IMPLEMENTATION GUIDE 1 (Oct. 2009), available at <http://www.cpoc.org/assets/QuickLinks/sb678guide.pdf> [hereinafter SB 678 IMPLEMENTATION GUIDE]; PUBLIC SAFETY REALIGNMENT FUNDING ALLOCATION *supra* note 149 at 2.

153. See AB 109 ALLOCATIONS, *supra* note 151, at 10; PUBLIC SAFETY REALIGNMENT FUNDING ALLOCATION *supra* note 149 at 3.

154. Recommended AB 109 Allocation Years 2 and 3, CAL. STATE ASS'N OF COUNTIES, http://www.csac.counties.org/sites/main/files/file-attachments/12.05.16_attachments_1_and_2_for_5-14-12_caoac_briefing.pdf [hereinafter Recommended AB 109 Allocation].

Fresno, Kern, Kings, San Bernardino, Shasta, and Tulare—that have historically sent higher rates of people convicted of low-level, non-violent offenses to state prison.¹⁵⁵ Counties that had historically relied more on local alternatives to incarceration—such as Alameda, Contra Costa, Sacramento, San Diego, and San Francisco—received proportionately less funding.¹⁵⁶ In effect, this funding formula rewarded those county criminal justice policy choices that contributed most to the state prison overcrowding crisis in the first place. In fiscal year 2011–12, for example, San Francisco, with a population of about 805,000, received about \$5.2 million while Tulare, with a population of about half of San Francisco’s (442,000), received more Realignment funding than San Francisco, about \$5.9 million.¹⁵⁷ Similarly, Fresno, with about 930,000 people, received over \$9 million compared to Contra Costa, with over a million people, which received about half as much Realignment money, approximately \$4.7 million.¹⁵⁸

While the funding formula for years two and three somewhat limited the extent to which counties could capitalize on prior years’ ADP, significant disparities still exist.¹⁵⁹ These allocation differences serve to underfund the counties that have contributed less to prison overcrowding by implementing more evidence-based practices. For example, in fiscal year 2012–13, San Diego, with a population of 3,140,069, received \$59.1 million, while San Bernardino, with two-thirds the population of San Diego, received \$54.9 million.¹⁶⁰

155. See *id.*; BD. FOR STATE AND CMTY. CORR., 2011 PUBLIC SAFETY REALIGNMENT ACT: REPORT ON THE IMPLEMENTATION OF COMMUNITY CORRECTIONS PARTNERSHIP PLANS, *supra* note 144, at app.

156. *Id.*; Ball, *supra* note 134.

157. See *State and County QuickFacts*, U.S. CENSUS BUREAU (Mar. 14, 2013), <http://quickfacts.census.gov/qfd/states/06000.html>; CAL. DEP’T OF CORR. & REHAB., 2011–12 AB 109 ALLOCATIONS, *available at* <http://www.cdcr.ca.gov/realignment/docs/BASE-REALIGNMENT-FUNDING.pdf>; MCCRAY ET AL., *supra* note 138, app. 1.

158. *Id.*

159. AB 109 ALLOCATIONS, *supra* note 151; *Recommended AB 109 Allocation*, *supra* note 154. See also BD. FOR STATE AND CMTY. CORR., 2011 PUBLIC SAFETY REALIGNMENT ACT: REPORT ON THE IMPLEMENTATION OF COMMUNITY CORRECTIONS PARTNERSHIP PLANS, *supra* note 144, at app.

160. AB 109 ALLOCATIONS, *supra* note 151; *Recommended AB 109 Allocation*, *supra* note 154; *Annual Estimates of the Resident Population for Counties and County-Equivalents: April 1, 2010 to July 1, 2011*, 2011 Population Estimates, United States Census Bureau, Population Division (Apr. 2012), *available at* <https://www.census.gov/popest/data/counties/totals/2011/files/CO-EST2011-Alldata.csv>.

See BD. FOR STATE AND CMTY. CORR., 2011 PUBLIC SAFETY REALIGNMENT ACT: REPORT ON THE IMPLEMENTATION OF COMMUNITY CORRECTIONS PARTNERSHIP PLANS, *supra* note 144, at app.

Similarly, among smaller counties, Imperial received \$3.1 million while Kings, with a nearly identical countywide population and violent crime rate, received twice as much—\$5.9 million.¹⁶¹

This is problematic because a county's historical ADP is a reflection of the county's past reliance upon incarceration in state prison, instead of utilizing alternatives to incarceration like those encouraged by Realignment. Professor Ball has conducted an extensive analysis of the rates at which California counties have historically sent people to state prison for felony convictions, and developed a ranking of counties comparing county violent crime rates to the rates at which they sent people to prison over a ten year period.¹⁶² The counties Ball denotes as "high use" counties have a greater disparity than other counties between their violent crime rate and imprisonment rate; that is, "high use" counties sent people to prison at higher rates than other counties with comparable violent crime rates.¹⁶³ In other words, it is not a simple matter of counties with more violent crime sending more people to prison, nor is it that counties achieve lower violent crime rates by sending more people to prison. For example, Ball notes that Alameda and San Bernardino Counties have similar population levels and similar violent crime levels.¹⁶⁴ Yet, over the past ten years, San Bernardino sent more than twice the number of people to state prison as Alameda County.¹⁶⁵ As Professor Ball points out, "California's prison overcrowding is due in large part to county decisions about how to deal with crime . . . California's counties use state prison resources at dramatically different rates . . ." ¹⁶⁶ It therefore does not make sense to continue rewarding counties for maintaining unnecessarily bloated custodial populations, rather than incentivizing smart-on-crime policies that focus on alternatives to incarceration and recidivism reduction.

It might be argued that the counties who have used state prison at higher rates for the Realignment class of offenses need more state funding assistance to implement Realignment, both because these counties have more people to supervise on PRCS and because these

161. See *Recommended AB 109 Allocation*, *supra* note 154; CAL. DEP'T OF JUSTICE, CRIMES AND CRIME RATES, 2001–2010 (KINGS) (2010), *available at* <http://oag.ca.gov/crime/cjsc-stats/2010/table1>; CAL. DEP'T OF JUSTICE, CRIMES AND CRIME RATES, 2001–2010 (IMPERIAL) (2010), *available at* <http://oag.ca.gov/crime/cjsc-stats/2010/table1>.

162. Ball, *supra* note 134, at 1014.

163. *Id.*

164. *Id.* at 994–95.

165. *Id.*

166. *Id.* at 987.

counties have less pre-existing non-carceral infrastructure and programming in place. There are at least two problems with this argument. First, the PRCS load on the counties resulting from their pre-Realignment state prison ADP will be a temporary burden, since the maximum terms of post-release supervision for these offenses is three years.¹⁶⁷ Second, this argument would be more persuasive if Ball's "high use" counties had used significant portions of the state Realignment funding they have received thus far to start building their capacity to provide alternatives to incarceration. But this has not been the case. Instead, these counties have spent far higher proportions on expanding jail capacity, and correspondingly lower proportions for non-carceral alternatives, than their sister counties.¹⁶⁸ A review of the counties' first year Realignment budgets showed that of the twenty-five counties receiving the most state Realignment dollars, ten were among Ball's "high use" counties.¹⁶⁹ Those ten counties spent an average of at least thirty percent of their Realignment funds to expand jail capacity.¹⁷⁰

Rather than relying upon prior years' ADP to drive so much of the state Realignment funding allocation decisions, the state could create a funding scheme that better incentivizes counties to reduce their

167. CAL. PENAL CODE § 3451.

168. See generally CROSSROADS, *supra* note 138, app. A; MCCRAY ET AL., *supra* note 138.

169. Those 10 counties are Fresno, Kern, Orange, Placer, Riverside, San Bernardino, Santa Barbara, Santa Clara, Kings and Shasta. Kings County plans to spend an astonishing 70 percent of its entire AB 109 allocation on expanding jail capacity, and is also seeking additional state funds under AB 900 for additional jail construction. CROSSROADS, *supra* note 138, app. A. See also ABARBANEL, *supra* note 4.

170. This thirty percent figure almost certainly underestimates the amounts being spent to expand jail capacity, because it is based upon specific amounts explicitly identified in the county Realignment plans; many of the plans, however, do not provide specific budgeted amounts for jail capacity expansion despite clear indications in the plans that such expansion is indeed in the works. The thirty percent figure does not include any amount from Orange County's plan, for instance, but that plan allocates to the Sheriff \$13.6 million of its overall \$23 million (or about fifty-nine percent) without specifying how much of this will go to expand jail capacity. The plan does note, however, that two facilities are currently partially closed due to a low jail census and ongoing repair work, and it is anticipated that all jail facilities will need to be fully operational within six to twelve months, which will require additional jail staffing and resources. Orange County's plan also contemplates applying for AB 900 funding to support the construction of approximately 750 new jail beds. See CMTY CORR. P'SHIP EXEC. COMM., ORANGE COUNTY PUBLIC SAFETY REALIGNMENT AND POSTRELEASE COMMUNITY SUPERVISION 2011 IMPLEMENTATION PLAN (Oct. 2011), available at http://calrealignment.org/component/docman/doc_download/79-orange-county-plan.html?Itemid.

recidivism rates.¹⁷¹ For instance, the California Community Corrections Performance Incentives Act of 2009 created a fiscal incentive for counties to improve probation outcomes.¹⁷² The statute created a funding stream under which counties received funding for probation based on their success in reducing the percentage of probationers sent to state prison compared to a baseline percentage that each sent to prison between 2006 and 2008.¹⁷³ Although the statute gave broad discretion to each county as to how to best implement evidence-based practices to decrease the number of probationers sent to state prison, counties were incentivized to improve their probation outcome in order to get increased funding.¹⁷⁴

The state could similarly revise the Realignment allocation formula to incentivize counties to reduce recidivism and increase use of cost-effective alternatives to incarceration. Once county-level outcome data is collected and reported throughout the state on a regular and uniform basis, the funding formula could be based upon these data, thereby creating incentives for counties to adopt the policies and programs that are demonstrated to work best.

Unfettered discretion, lack of formal mechanisms for accountability, and lack of incentives have resulted in uneven Realignment implementation across the state. Some counties have begun taking the evidence-based path that will reduce recidivism and improve public safety.¹⁷⁵ However, many others continue to rely almost exclusively on incarceration, increasing their jail capacities rather than reducing population through strategies like pretrial release and alternative sanctions contemplated under Realignment, such as split sentencing with a mandatory supervision tail, electronic monitoring of sentenced defendants and other community supervision options for both pretrial and sentenced individuals.¹⁷⁶ Because many counties are not pursuing evidence-based alternatives to custody, the

171. See PUBLIC SAFETY REALIGNMENT FUNDING ALLOCATION *supra* note 149 at 5.

172. See S.B. 678, 2009–2010 Leg., Reg. Sess. (Cal. 2009); CAL. PENAL CODE §§ 1228, 1233.4; SB 678 IMPLEMENTATION GUIDE, *supra* note 152, at 1; THE 2011 REALIGNMENT OF ADULT OFFENDERS, *supra* note 139, at 15.

173. *Id.*

174. *Id.*

175. See *County Realignment Dashboard*, CHIEF PROBATION OFFICERS OF CAL., http://www.cpoc.org/assets/Realignment/dashboard_county.swf (last updated Apr. 8, 2014).

176. *Id.* For example, the statewide split sentencing rate was only 27.7 percent in from October 2012 through September 2013. See *California Realignment Dashboard*, *supra* note 14. Very few counties have allocated Realignment funds to start pretrial release programs and very few have begun to make good use of electronic monitoring for both pretrial and sentenced individuals. See CROSSROADS, *supra* note 138, app. A.

total number of people incarcerated in the state is much higher than it could be.¹⁷⁷

While California's prison population has fallen by nearly 25,000 since the enactment of Realignment, the state has awarded counties \$1.7 billion¹⁷⁸ to expand jail capacity and counties have added thousands of new beds to their jails.¹⁷⁹ In addition, there are current efforts underway to spend \$500 million more to further expand counties jails.¹⁸⁰ This explosion of jail expansion flies in the face of the express legislative intent of Realignment: to implement proven recidivism-reducing policies, focusing on alternatives to incarceration.¹⁸¹ There are a number of potential ramifications of the shift of the overcrowding problem from the state to the counties. Counties with incarceration-focused Realignment plans, many of which are already under court-ordered population caps, are in danger of facing mini-*Plata* lawsuits.¹⁸² Another pressing concern is that jails

177. See *County Realignment Dashboard*, *supra* note 175; *CROSSROADS*, *supra* note 138; *MCCRAY ET AL.*, *supra* note 138.

178. In AB 900 authorized the state to grant \$1.2 billion to counties to expand jail capacity. A.B. 900, 2007–2008 Leg., Reg. Sess. (Cal. 2007). In 2012, the Legislature allocated another \$500 million to counties to further expand their jail capacity. S.B. 1022, 2011–2012 Leg., Reg. Sess. (Cal. 2012).

179. See *CROSSROADS*, *supra* note 138, at 12; CAL. BD. OF CORR., AB 900 PHASE II COUNTY JAIL CONSTRUCTION OR EXPANSION APPLICATION SUMMARIES JANUARY 11, 2012 (updated Sept. 2012), *available at* http://www.bscc.ca.gov/download.php?f=/AB_900_Project_Status_Update_for_BSCC_web_082213.pdf; CAL. CORR. STANDARDS AUTHORITY, AB 900 PHASE I JAIL CONSTRUCTION FUNDING AWARDS, UPDATED DECEMBER 9, 2013 (Dec. 9, 2013), *available at* http://www.bscc.ca.gov/download.php?f=/AB_900_Phase_I_Awards_2013-12-09.pdf; CAL. BD. OF CORR., AB 900 PHASE II – JAIL CONSTRUCTION FUNDING AWARDS UPDATED JANUARY 16, 2014 (Jan. 16, 2014), *available at* http://www.bscc.ca.gov/download.php?f=/AB_900_Phase_II_Awards_2014-01-16.pdf; CAL. BD. OF CORR., SB 1022 ADULT CRIMINAL JUSTICE FACILITIES, PROPOSALS RECEIVED BY OCTOBER 24, 2013 (Nov. 13, 2013), *available at* http://www.bscc.ca.gov/download.php?f=/SB-1022_Proposal_Summary.pdf; CAL. BD. OF CORR., SB 1022 ADULT CRIMINAL JUSTICE FACILITIES, SB 1022 ADULT LOCAL CRIMINAL JUSTICE FACILITIES CONSTRUCTION FUNDING AWARDS (Mar. 13, 2014), *available at* [http://www.bscc.ca.gov/download.php?f=/SB_1022_Conditional_Award_List_\(2\).pdf](http://www.bscc.ca.gov/download.php?f=/SB_1022_Conditional_Award_List_(2).pdf).

180. In the Governor's current 2014–15 Budget Summary, he proposes "that another \$500 million be authorized for SB 1022-type facilities." EDMUND G. BROWN JR., 2014–15 GOVERNOR'S BUDGET SUMMARY, To the California Legislature, Regular Session 2013–14 (Jan. 10, 2014) at 84, *available at* <http://www.ebudget.ca.gov/2014-15/pdf/BudgetSummary/FullBudgetSummary.pdf>.

181. See CAL. PENAL CODE § 17.5(a).

182. In December 2011, the Prison Law Office filed a class action lawsuit against the Fresno Sheriff on behalf of jail inmates denied mental health care and medical treatment for life-threatening illnesses. As in *Plata*, the plaintiffs alleged cruel and unusual conditions in violation of their rights under the Eighth and Fourteenth Amendments. Complaint, Hall v.

were never designed for long-term incarceration. As a result, many inmates receive inadequate access to exercise, rehabilitation programming, medical and mental health care, and family visits. In addition, county jails may not be sufficiently equipped to meet the ADA needs that come with increased populations. As such, they may face a plethora of lawsuits.¹⁸³ As one commentator has warned:

The ever-present risk of realignment is that it could turn the Plata/Coleman court order into a shell game instead of a solution to California's incarceration conditions problem. Medical and mental health care in California's prisons was indisputably horrendous, but population reduction is finally allowing the other substantive parts of the remedies to work. This achievement would be far less significant if the order turned out to dump on the counties not just population, but the unconstitutional conditions that, in California's prisons, accompanied population. Call this the potential hydra problem: chopping the head off of unconstitutional prison conditions could cause many of the 58 counties to in turn develop unconstitutional conditions of jail confinement.¹⁸⁴

4. *The Realignment Legislation Does Not Address the Pretrial Detention Problem*

It is clear that Realignment's success is inextricably tied to the capacity of county criminal justice systems to meet their new obligations. Critics of Realignment have argued that many county jails

Mims, No. 1:11-cv-02047-LJO-BAM, 2012 WL 1498893 (E.D. Cal. Dec. 13, 2011). Similarly, in the 1970s and 80s, when the Fifth Circuit found Texas prisoners' Eighth Amendment rights were violated and ordered remedial measures be taken to reduce the prison population, these actions led to increased crowding in Texas county jails. *See, e.g., Alberti v. Sheriff of Harris Cnty., Tex.*, 937 F.2d 984, 987-88 (5th Cir. 1991) (describing how a proposed remedy to the Texas prison overcrowding crisis required convicted felons sentenced to the state's prison system to stay longer in county jail while they awaited transfer to prison, thereby leading to dangerously overcrowded county jails); *see also Ruiz v. Estelle*, 679 F.2d 1115 (1982) (requiring the state to take remedial measures to reduce prison overcrowding).

183. *See, e.g., Armstrong v. Wilson*, 942 F. Supp. 1252 (N.D. Cal. 1996), *aff'd* 124 F.3d 1019 (9th Cir. 1997) (finding that the CDCR was violating the Americans with Disabilities Act and the Rehabilitation Act and issuing an injunction requiring the CDCR to improve access to prison programs for prisoners with physical disabilities at all of California's prisons and parole facilities). *See, e.g., Complaint at 1, Legal Servs. for Prisoners with Children v. Ahern*, No. RG12656266, (Cal. Super. Ct., Nov. 15, 2012) (alleging systemic and long-term discrimination against persons with disabilities housed at Santa Rita Jail has resulted in unequal treatment of and severe harm to those inmates).

184. Margo Schlanger, *Plata v. Brown And Realignment: Jails, Prisons, Courts, And Politics* 48 HARV. C.R.-C.L. L. REV., (forthcoming Jan. 2013) (manuscript at 44-49); *see also Alberti*, 937 F.2d 984; *Ruiz*, 679 F.2d 1115.

are themselves overcrowded, and therefore unable to absorb newly sentenced defendants who would previously have been sent to state prison.¹⁸⁵ County jails, however, are not full of individuals who have been convicted of crimes, or even individuals deemed to present a high public safety risk to the community. Most people in county jails have not been convicted of the charges against them. Instead, more than sixty-three percent of the 82,000 Californians held in county jails on any given day are awaiting their day in court.¹⁸⁶ A substantial amount of them remain incarcerated pending trial or other case disposition not because they pose a significant risk to public safety, but because they simply cannot afford bail.¹⁸⁷

High rates of pretrial detention are a threat to public safety and civil liberties. People with financial resources are able to get out of jail and return to their jobs, families, and communities. People who are unable to pay for bail or raise the necessary collateral, however, must stay in jail awaiting a trial date that could be months away. Or, they may more readily decide to accept a plea bargain as a means of getting out of jail. New research also indicates defendants detained for the entire pretrial period are much more likely to be sentenced to jail and

185. See Kurtis Alexander, *Fresno County Demands More State Funds for Housing Prisoners*, FRESNO BEE (Dec. 2, 2012), <http://www.fresnobee.com/2012/12/02/3086872/valley-counties-look-for-more-prison.html>; Letter from thirteen Central Valley legislators to the Honorable Jerry Brown (Dec. 5, 2012), available at <http://news.fresnobeehive.com/wp-content/uploads/2012/12/Realignment-Coalition-Letter-Central-Valley.pdf>; Kurtis Alexander, *Valley Lawmakers Ask Governor for More Prison Money*, FRESNO BEE (Dec. 8, 2012), <http://news.fresnobeehive.com/archives/731>.

186. See CAL. BD. OF CORR., JAIL PROFILE SURVEY, SECOND QUARTER CALENDAR YEAR 2013 7 (2013), available at http://www.bscc.ca.gov/download.php?f=/2013_2nd_Qtr_JPS_full_report.pdf.

187. Trial judges are required to evaluate defendants' suitability for bail and to order held without bail those deemed to present too great a risk to public safety. This makes sense: if someone is deemed a public safety risk, the mere fact that they may be able to come up with money for bail does not mitigate that risk. By setting bail for a defendant, a judge is indicating that releasing that defendant pending trial does not present an unreasonable public safety risk. A substantial and increasing number of defendants held in jail pending trial have had bail set but cannot afford to post it. They therefore remain in jail not because they pose a threat to public safety but rather because they cannot afford bail. CAL. PENAL CODE § 1275; see PRETRIAL JUSTICE INST., RATIONAL AND TRANSPARENT BAIL DECISION MAKING: MOVING FROM A CASH-BASED TO A RISK-BASED PROCESS 1, 3 (2012), available at <http://www.pretrial.org/Featured%20Resources%20Documents/Rational%20and%20Transparent%20Bail%20Decision%20Making.pdf>; see also JOHN CLARK, THE IMPACT OF MONEY BAIL ON JAIL BED USAGE, AMERICAN JAILS 47-48 (July/Aug., 2010), available at <http://www.pretrial.org/wp-content/uploads/filebase/pji-reports/AJA%20Money%20Bail%20Impact%202010.pdf>.

prison and are also likely to receive longer sentences.¹⁸⁸ These results have nothing to do with public safety. They have everything to do with wealth and poverty. People with money are able to buy their freedom while poor people cannot.

One contributor to California's high rate of pretrial detention is the State's reliance on money-bail.¹⁸⁹ This reliance on money-bail is in contrast to other jurisdictions which have more expansive presumptions in favor of own recognizance ("O.R.") release and in which non-financial release, rather than money-bail, is the default.¹⁹⁰ Another

188. See CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND AND ALEXANDER HOLSINGER, INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES (Nov. 2013), available at http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_state-sentencing_FNL.pdf.

189. See PRETRIAL JUSTICE INSTITUTE, RATIONAL AND TRANSPARENT BAIL DECISION MAKING: MOVING FROM A CASH-BASED TO A RISK-BASED PROCESS 1,3 (Mar. 2012), available at <http://www.pretrial.org/download/featured/Rational%20and%20Transparent%20Bail%20Decision%20Making.pdf> ("The data indicates that money bail is for many defendants the cause for pretrial detention. In 1990, money bonds were being set in 53 percent of felony cases. By 2006, that figure had jumped to 70 percent. As the use of money bonds has gone up, pretrial release rates have gone down. In 1990, 65 percent of felony defendants were released while awaiting trial, compared to 58 percent in 2006." (citations omitted); also noting citing figures showing that seven out of ten felony defendants nationwide are required to post a money bond to be released pending trial). California's pretrial population is at 63% of total jail population, or 82,000 persons and from 2002 to 2012, county bail levels for the most frequently committed felony offenses increased by an inflation-adjusted 22 percent. See SONYA M. TAFOYA, PUB. POL'Y INST. OF CAL., ASSESSING THE IMPACT OF BAIL ON CALIFORNIA'S JAIL POPULATION at 15 (June 2013), available at http://www.ppic.org/content/pubs/report/R_613STR.pdf. The latest Bureau of Justice Statistics report shows that 69 percent of the pretrial detainees in Los Angeles County are held in lieu of bail, 68 percent are held in lieu of bail in Orange, 48 percent are held in lieu of bail in San Bernardino, and 59 percent are held in lieu of bail in Ventura. See THOMAS H. COHEN & TRACY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006 25, 37 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf>. A study of felony defendants in America's 75 largest urban counties showed that in 1990, release on recognizance accounted for 42 percent of releases, compared to 25 percent released on surety bond. By 2006, the proportions had been reversed: surety bonds were used for 43% of releases, compared to 25 percent for release on recognizance. So it is clear that the majority of pretrial release involves money-bail. See Conference of State Court Administrators, 2012-2013 Policy Paper Evidence-Based Pretrial Release, available at http://www.colorado.gov/ccjdir/Resources/Resources/Ref/EBPre-TrialRelease_2012.pdf (citing THOMAS H. COHEN AND KYCKELHAHN, T., WASHINGTON D.C.: US DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PLANNING, BUREAU OF JUSTICE, STATISTICS FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 2).

190. See CONFERENCE OF STATE COURT ADMINISTRATORS, 2012-2013 POLICY PAPER EVIDENCE-BASED PRETRIAL RELEASE, available at http://www.colorado.gov/ccjdir/Resources/Resources/Ref/EBPre-TrialRelease_2012.pdf

contributor is California's system of fixed bail schedules, under which the superior court in each county is required to create and adopt a county-wide bail schedule for all bailable felony offenses and all misdemeanor and infractions.¹⁹¹ Bail schedules by their very nature are based primarily on the seriousness of the offense charged and do not reflect any individual assessment concerning probability of appearance or risk to public safety. Although California law mandates an individualized determination in setting, reducing or denying bail,¹⁹² California's reliance on these money-based bail schedules has warped into a presumptive bail system.

All the while, there is no evidence that defendants' ability to afford bail correlates to their risk of committing a new crime while out on bail, or even their likelihood of appearing in court. Instead there are demonstrated other means by which a court can fulfill its job of ensuring a defendant's appearance at a next court appearance and protecting public safety. For example, pretrial risk assessment research over the past thirty years indicates that there are common factors, such as prior failure to appear, prior convictions and whether the defendant has a pending case at the time of arrest, that can help predict court

(Explaining that "[t]welve states, the District of Columbia, and the federal government have enacted a statutory presumption that defendants charged with bailable offenses should be released on personal recognizance or unsecured bond unless a judicial officer makes an individual determination that the defendant poses a risk that requires more restrictive conditions or detention" and citing the federal statute and D.C. code and statutes from Washington D.C., Delaware, Iowa, Kentucky, Massachusetts, Maine, Nebraska, North Carolina, Oregon, South Carolina, Tennessee and Wisconsin; Also noting that "[s]ix other states have adopted this presumption by court rule," citing rules from Arizona, Minnesota, New Mexico, North Dakota, D.C. and Wyoming). California's statute contains a presumption of OR release only for misdemeanants. Although the statute permits a court to release others on their own recognizance there is no encouragement to do so, nor guidelines suggesting least restrictive methods of release. *See* CAL. PENAL CODE § 1270(a) ("Any person who has been arrested for, or charged with, an offense other than a capital offense may be released on his or her own recognizance by a court or magistrate who could release a defendant from custody upon the defendant giving bail, including a defendant arrested upon an out-of-county warrant. A defendant who is in custody and is arraigned on a complaint alleging an offense which is a misdemeanor, and a defendant who appears before a court or magistrate upon an out-of-county warrant arising out of a case involving only misdemeanors, shall be entitled to an own recognizance release unless the court makes a finding on the record, in accordance with Section 1275, that an own recognizance release will compromise public safety or will not reasonably assure the appearance of the defendant as required. Public safety shall be the primary consideration. If the court makes one of those findings, the court shall then set bail and specify the conditions, if any, whereunder the defendant shall be released.").

191. *See* CAL. PENAL CODE § 1269b(c).

192. *See* CAL. PENAL CODE § 1275.

appearance and/or likelihood of re-arrest while awaiting trial.¹⁹³ These factors can be assessed through the application of an evidence-based risk assessment tool, which many jurisdictions currently use as part of the process of assessing defendants and making release recommendations to the court.¹⁹⁴ This assessment can assist the court in making a determination as to whether a defendant should be released on O.R. with no supervision, released on O.R. with some supervision and conditions, or in limited circumstances remain incarcerated—all without reliance on the charge-based bail schedule. Many jurisdictions using risk assessment tools and pretrial programs to assess and release defendants on non-financial terms have shown great success as measured by high court appearance rates and low rates of re-arrest.¹⁹⁵

The bottom line is that a focus on money-bail rather than any meaningful assessment of the defendant or evaluation of potential risk means that many people who present little-to-no public safety or “failure to appear” danger remain unnecessarily behind bars pending trial. U.S. Attorney General Eric Holder recently agreed, noting in 2011 that “[a]lmost all of these [non-sentenced, pretrial] individuals could be released and supervised in their communities—and allowed to pursue or maintain employment, and participate in educational opportunities and their normal family lives—without risk of

193. See MARIE VANNOSTRAND AND CHRISTOPHER T. LOWENKAMP, ASSESSING PRETRIAL RISK WITHOUT A DEFENDANT INTERVIEW (Nov. 2013), available at http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_no-interview_FNL.pdf. The list factors include things such as: whether the defendant had a pending case at the time of arrest; whether the defendant had an active warrant for failure to appear at the time of arrest or a history of failure to appear; and whether the defendant had prior misdemeanor, felony or violent crime convictions. Some jurisdictions around the country also look at factors such as residence stability; employment stability; community ties; and history of substance abuse. However, the recent VanNostrand and Lowenkamp research indicates that the dynamic factors in an assessment, such as employment and residence, may be less predictive or not predictive at all. *Id.*

194. See, e.g., CAFWD: PARTNERSHIP FOR COMMUNITY EXCELLENCE, PRETRIAL DETENTION & COMMUNITY SUPERVISION: BEST PRACTICES AND RESOURCES FOR CALIFORNIA COUNTIES 14–18 (Sept. 2012), available at http://caforward.3cdn.net/7a60c47c7329a4abd7_2am6iyh9s.pdf; *Report on Status of Pretrial Program Santa Cruz County, dated September 12, 2013, presented to the Board of Supervisors* (Sept. 24, 2013), available at http://sccounty01.co.santa-cruz.ca.us/bds/Govstream/BDSvData/non_legacy/agendas/2013/20130924/PDF/025.pdf; CRIME AND JUSTICE INSTITUTE AT COMMUNITY RESOURCES FOR JUSTICE, YOLO COUNTY ASSESSMENT REPORT OF REALIGNMENT PLAN STRATEGIES (May 2013), available at <http://www.yolocounty.org/home/showdocument?id=22762>.

195. See, e.g., CAFWD: PARTNERSHIP FOR COMMUNITY EXCELLENCE, *supra* note 194; *Report on Status of Pretrial Program Santa Cruz County*, *supra* note 194; CRIME AND JUSTICE INSTITUTE AT COMMUNITY RESOURCES FOR JUSTICE, *supra* note 194.

endangering their fellow citizens or fleeing from justice.”¹⁹⁶ In order for California to meaningfully address its jail overcrowding problem, especially in light of the additional burdens Realignment places on local criminal justice systems, counties must transition away from the unfair and ineffective money-based bail system.

Examples of sensible state law reforms include amending pretrial detention laws to expand the presumption of O.R. release that currently exists for misdemeanors to those charged with non-violent, non-serious felonies and mandating greater use of non-financial release across-the-board. County-based reforms should include creating comprehensive pretrial release programs that use evidence-based criminal justice practices and validated risk assessment tools to assist the court in making fair and informed pretrial release decisions, and provide supervision and services to releasees where appropriate.¹⁹⁷ Reforms should also ensure that defendants are represented by counsel at initial appearance when release determinations are made, provide adequate staffing and training and mandate data collection and analysis to evaluate the effectiveness of the programs.

IV. AFTER REALIGNMENT: SIGNIFICANT DEVELOPMENTS IN THE THREE YEARS SINCE REALIGNMENT WAS ENACTED

The State itself was eventually forced to acknowledge that Realignment alone could never reduce the prison population to the levels mandated by the *Plata* court.¹⁹⁸ In early 2013, with the two-year

196. Attorney General Eric Holder, *Remarks at the National Symposium on Pretrial Justice* (June 1, 2011), available at http://www2.americanbar.org/sections/criminaljustice/CR203800/Pages/pretrialjustice_holder.aspx.

197. Examples of successful pretrial programs include the Allegheny County bail agency and the D.C. Bail Project. See PRETRIAL JUSTICE INST., PRETRIAL JUSTICE INSTITUTE GUIDES INNOVATIVE REFORMS, HELPING JUSTICE TRUMP TRADITION: NEW AGENCY IN ALLEGHENY COUNTY, PENNSYLVANIA INCREASES PRETRIAL FAIRNESS AND SAFETY, CASE STUDIES FALL 2008 at 3, available at <http://pretrial.org/Success/Case%20Study%201%20Allegheny%20County.pdf> (“With technical assistance from the Pretrial Justice Institute, the agency has established one of the nation’s most innovative pretrial programs.”); PRETRIAL JUSTICE INST., THE D.C. PRETRIAL SERVICES AGENCY: LESSONS FROM FIVE DECADES OF INNOVATION AND GROWTH, CASE STUDIES FALL 2008 at 1, available at <http://www.pretrial.org/Reports/PJI%20Reports/Case%20Study%202%20-%20DC%20Pretrial%20Services.pdf> (“The agency is also a model nationally for demonstrating that the vision for pretrial justice outlined in the standards of the American Bar Association and the National Association of Pretrial Services Agencies can be achieved.”).

198. See, e.g., Defendant’s Response to October 11, 2012 Order to Develop Plans to

Supreme Court deadline approaching, the State had reduced the prison population by about 23,000, bringing it to about 150 percent of design capacity.¹⁹⁹ But the initially steep drop-off in prisoner population had plateaued.²⁰⁰

Nonetheless, the State asked the three-judge court to end federal oversight of its prisons.²⁰¹ The State argued that the CDCR could provide constitutionally adequate medical care at 149.6 percent of design capacity²⁰² and claimed that improvements in prisoner medical services had rectified any previous constitutional deficiencies.²⁰³ The State further argued that all California prisons were at least “moderately” adhering to the policies and procedures on which the

Achieve Required Prison Population Reduction, *supra* note 25, at 1; Defendant’s Motion to Vacate or Modify Population Reduction Order, *supra* note 5, at 1. *See also Three-Judge Court Updates*, *supra* note 25. *See* Declaration of James Austin in Support of Plaintiffs’ Statement in Response to October 11, 2012 Order Regarding Population Reduction, *supra* note 18, at 2.

199. *See* Defendant’s Motion to Vacate or Modify Population Reduction Order, *supra* note 5, at 8 (“As of December 26, 2012, 119,327 inmates were housed in the State’s 33 adult institutions, which amounts to 149.6% of design bed capacity.”); Declaration of Jeffrey Beard, Ph.D., In Support of Defendants’ Motion to Vacate or Modify Population Reduction Order, *supra* note 130, at 3.

200. *See* Declaration of James Austin in Support of Plaintiffs’ Statement in Response to October 11, 2012 Order Regarding Population Reduction, *supra* note 18, at 2–3 (figures illustrate that the impact of Realignment has hit a plateau); *see also* Plaintiffs’ Statement in Response to October 11, 2012 Order Re Population Reduction at 2, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2013) (No. 01-1351).

201. *See* Defendant’s Motion to Vacate or Modify Population Reduction Order, *supra* note 5, at 21.

202. The State moved to vacate the Court’s order to reduce the prison population to 137.5 percent of design capacity. *See* Defendant’s Motion to Vacate or Modify Population Reduction Order, *supra* note 5, at 8; Declaration of Jeffrey Beard, Ph.D., In Support of Defendants’ Motion to Vacate or Modify Population Reduction Order, *supra* note 130, at 3. *But cf.* Receiver’s Response to Defendants’ Objections to Receiver’s 22nd Report at 5, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2013) (No. 01-1351) (according to J. Clark Kelso, the federal receiver overseeing healthcare at the CDCR, “[t]he bottom one-third of the institutions—the institutions which the Receiver’s QMC [Quality Management Committee] has determined have the greatest need for improvement—had an average population density of 155%. These numbers make it clear that overcrowding is still having a direct impact upon the ability to deliver quality healthcare.”); *see also id.*, Exhibit 1 (summarizing performance improvements and targeted support by institution); *id.*, Exhibit 2 (demonstrating population by CDCR facility).

203. *See* Defendants’ Motion to Vacate or Modify the Population Reduction Order at 16, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2013) (No. 01-1351) (concluding that all CDCR prisons are meeting the Inspector General’s “moderate adherence standard” for constitutional medical care and over half of the institutions are meeting the “high adherence” standard). *See also* Declaration of Jeffrey Beard, Ph.D., In Support of Defendants’ Motion to Vacate or Modify Population Reduction Order, *supra* note 130, at 4–5.

Plata court's injunction is based, and over half had met the Inspector General's "high adherence" standard.²⁰⁴ According to the State, any additional steps beyond those already implemented to reduce the prison population were impossible without significantly endangering public safety.²⁰⁵ The State therefore requested that the court rescind its population cap order.²⁰⁶

At a press conference on January 8, 2013, Governor Edmund G. Brown Jr. repeated publicly the assertions that the State had made in its recent court filing, dramatically proclaiming that "the prison emergency is over in California" and rescinding previous Governor Arnold Schwarzenegger's declaration of a state of emergency.²⁰⁷

Despite the State's legal arguments and the Governor's theatrics, in April 2013, the *Plata* three-judge court refused to increase the 137.5 percent cap. The court did, however, grant the State a six-month extension to December 2013 to meet the population target.²⁰⁸ Under

204. *Id.*

205. Defendant's Motion to Vacate or Modify Population Reduction Order, *supra* note 5, at 2. See Declaration of Jeffrey Beard, Ph.D., In Support of Defendants' Motion to Vacate or Modify Population Reduction Order, *supra* note 130, at 7 ("Continued enforcement of the 137.5 percent number—in addition to being unnecessary—would also come at a significant cost to the State, and to public safety. Realignment implemented the safest prisoner-reduction measures by shifting lower level offenders to local control, while leaving more serious offenders in prison. The further reductions needed to reach the 137.5% level cannot be achieved without the early release of inmates convicted of violent or serious felonies.") (emphasis added); Defendants' Motion to Vacate or Modify the Population Reduction Order, *supra* note 203, at 20.

206. *Id.*

207. See *Governor Jerry Brown on State Prisons*, THE CAL. CHANNEL (Jan. 8, 2013), <http://www.calchannel.com/governor-jerry-brown-on-state-prisons/> (video of Governor Brown calling for end to federal court monitoring, waving his Proclamation for assembled reporters and pointing to a nearby table piled high with legal filings from the litigation); *California Challenges Federal Oversight of Prisons*, KQED (Jan. 9, 2013), <http://www.kqed.org/a/forum/R201301090900> (audio file of Forum program hosted by Michael Krasny with Guests: Governor Jerry Brown, Joan Petersilia, criminologist and co-director of the Stanford Criminal Justice Center; Rebekah Evenson, staff attorney with the Prison Law Office; and Terri McDonald, undersecretary of the California Department of Corrections and Rehabilitation; includes statement of Governor Brown asserting, "We've gone from serious constitutional problems to one of the finest prison systems in the United States."); *Prison Overcrowding State of Emergency Proclamation*, *supra* note 96; *Proclamation Terminating the Prison Overcrowding Proclamation*, *supra* note 96; Allen Hopper, *Despite Declaration, Prison Crisis Not Over Yet*, DAILY J. (Jan. 23, 2013) (photo of Governor Brown holding up the proclamation he signed declaring the end to the prison overcrowding emergency).

208. See Opinion and Order Denying Defendants' Motion to Vacate or Modify Population Reduction Order, *supra* note 95, at 2 (the order gives the state a six-month extension; the State now has until December 31, 2013 to meet the 137.5 percent population cap).

protest, the State submitted a “population reduction plan” as ordered by the three-judge court,²⁰⁹ setting out several additional steps the State could take to get closer to the 137.5 percent cap. The three-judge court affirmed its prior orders requiring the State to meet the 137.5 percent population cap by the end of 2013, and added specific steps the State was required to take, including sending more prisoners to firefighting camps, increasing good-time credits for nonviolent individuals, and paroling geriatric prisoners.²¹⁰ The order also permitted the State to lease cells at county jails and continue housing inmates in private out-of-state prisons.²¹¹ The three-judge court further ordered the State to develop a list of the lowest risk prisoners who could be released if the State’s other population-reduction measures failed to reduce the prison population to the 137.5 percent ceiling by December 31, 2013.²¹² The State appealed this ruling to the U.S. Supreme Court and applied for a stay of injunctive relief pending final disposition of the appeals.²¹³ The Supreme Court denied the stay, and subsequently denied the State’s petition for review, leaving the December 2013 deadline in place.²¹⁴

A. *The Enactment of SB 105*

In late August 2013, with little time remaining to meet the three-judge court’s December 2013 deadline, the Governor, with the support of Assembly Democrats, introduced Senate Bill 105 as the state’s new plan to supplement Realignment and reduce prison overcrowding enough to meet the *Plata* requirements. The original terms of SB 105 would have allowed the state to increase prison capacity by 12,500 beds through contracts with out-of-state and private in-state facilities and suspended the closure of the California Rehabilitation Center.²¹⁵ This would all have come with a price tag to taxpayers of over \$715

209. See Amended Defendants’ Response to April 11, 2013 Order Requiring List of Proposed Population Reduction Measures; Court-Ordered Plan at 5–28, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2013) (No. 01-1351); Opinion and Order Requiring Defendants to Implement Amended Plan at 48, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2013) (No. 01-1351).

210. See Opinion and Order Requiring Defendants to Implement Amended Plan, *supra* note 209.

211. *Id.*

212. *Id.*

213. See Notice of Appeal to the Supreme Court of the United States at 2–3, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2013) (No. 01-1351); Application for Stay of Injunctive Relief Pending This Court’s Final Disposition of Appeals Pursuant to 28 U.S.C. § 1253, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2013) (No. 01-1351).

214. *Brown v. Plata*, 134 S. Ct. 1 (2013).

215. See S.B. 105, *supra* note 11 (introduced Aug. 27, 2013).

million over two years,²¹⁶ which would have been inconceivable in 2011 when the Supreme Court had issued its *Plata* ruling.²¹⁷ However, it was feasible in 2013, when improvements in the state's fiscal situation resulted in an estimated budget surplus of \$2.4 billion.²¹⁸ Under the legislation, authority for these contracts would sunset in January 2017; however, the Governor's stated plan was to enter into these contracts only through June 2015.²¹⁹ Among other concerns, the Legislative Analyst's Office found that this plan was extremely costly and would likely result in short term compliance with the court order but would fail to create a durable solution to the prison overcrowding crisis.²²⁰

Approximately a week after SB 105 was introduced, a competing bill authored by Senate President pro Tem Darrell Steinberg was introduced as the Senate Democrats' alternative to the Governor's plan.²²¹ Steinberg's bill, AB 84, proposed to seek a settlement with plaintiffs' attorneys that would have included a three-year extension to meet the population cap, established a grant program incentivizing counties to reduce probation revocations to state prison by increasing local programming, and created an advisory commission on public safety that would advise the Legislature and the Governor on durable strategies for reaching and maintaining the mandated population cap.²²²

On September 9, 2013, the Governor and Senator Steinberg announced they reached a compromise,²²³ and a few days later the Governor signed into law an amended version of SB 105.²²⁴ The approved legislation cut the originally proposed allocation to CDCR

216. See *id.*; ADDRESSING THE FEDERAL COURT PRISON POPULATION CAP, *supra* note 11, at 2.

217. See 2011–12 GOVERNOR'S BUDGET SUMMARY, *supra* note 8.

218. See MAC TAYLOR, LEG. ANALYST'S OFFICE, THE 2013–14 BUDGET (Nov. 2013) at 7–8, available at <http://www.lao.ca.gov/reports/2013/bud/spending-plan/spending-plan-073013.pdf> [hereinafter LEG. ANALYST'S OFFICE, THE 2013–14 BUDGET].

219. See ADDRESSING THE FEDERAL COURT PRISON POPULATION CAP, *supra* note 11, at 2.

220. *Id.* at 3–6.

221. A.B. 84, 2013–2014 Leg., Reg. Sess. (Cal. 2013) (introduced Sept. 3, 2013) (noting, “Governor’s Plan Addresses Short-Term, But Not Long-Term Problem”).

222. See *id.*; ADDRESSING THE FEDERAL COURT PRISON POPULATION CAP, *supra* note 11 at 7.

223. See, e.g., Chris Megerian, *Deal brokered on plan to ease California prison crowding*, LA TIMES (Sept. 9, 2013), <http://articles.latimes.com/2013/sep/09/local/la-me-legislature-prisons-20130910>.

224. S.B. 105, *supra* note 11; CAL. GOV'T. CODE §§ 19050.2, 19050.8; CAL. PENAL CODE. §§ 1233.1, 1233.3, 1233.4, 1233.9, 2910, 2915, 6250.2, 11191, 13602; 2012 Cal. Stat. § 15, ch. 42 (Cal. 2013).

from \$715 million to \$315 million and requires that the department spend the funds only to the extent needed to avoid early release of prisoners under the *Plata* order. Any amounts from this \$315 million not encumbered by June 30, 2014 are to be transferred to a new Recidivism Reduction Fund.²²⁵ SB 105 also authorized the CDCR to enter into contracts for prisoner housing with out-of-state and privately run in-state prisons, allowed for the involuntary transfer of prisoners to out-of-state facilities, and created incentives for counties to implement local programs that reduce probation revocations to prison.²²⁶

Following the passage of SB 105 and the Supreme Court's refusal to hear the State's request to do away with the 137.5 percent population cap,²²⁷ the State asked the three-judge court for a three-year extension to reduce the prison population.²²⁸ The three-judge court ordered the State and plaintiffs to work together to reach an agreement about the extension and temporarily extended the population reduction deadline to January 27, 2014.²²⁹ When the parties were unable to reach agreement,²³⁰ the State requested another two-year extension to reduce the prison population;²³¹ the plaintiffs' opposed the request.²³²

225. *Id.* Any money in the Recidivism Reduction fund may be transferred to the State Community Corrections Performance Incentives Fund, which provides money to counties to incentivize them to send fewer people to state prison. *Id.*

226. S.B. 105, *supra* note 11; CAL. GOV'T. CODE §§ 19050.2, 19050.8; CAL. PENAL CODE. §§ 1233.1, 1233.3, 1233.4, 1233.9, 2910, 2915, 6250.2, 11191, 13602; 2012 Cal. Stat. § 15, ch. 42 (Cal. 2013).

227. *Brown v. Plata*, 134 S. Ct. 1 (2013).

228. *See* Defendants' Request for an Extension of December 31, 2013 Deadline and Status Report in Response to June 30, 2011, April 11, 2013, June 20, 2013, and August 9, 2013 Orders at 5, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2014), (No. 01-1351) ("Defendants respectfully request that that Court extend the December 31, 2013 deadline to reduce the prison population to 137.5% of design capacity by three years to December 31, 2016.").

229. *See* Order to Meet and Confer at 2–3, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2014) (No. 01-1351) ("It is hereby ordered that the parties shall meet and confer, beginning immediately, regarding defendants' pending request. . . . The meet-and-confer process shall explore how defendants can comply with this Court's June 20, 2013 Order, including means and dates by which such compliance can be expedited or accomplished and how this Court can ensure a durable solution to the prison crowding problem.").

230. *See* Order to File Proposed Orders Re: Defendants' Request to Extend Population Reduction Deadline at 1, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2014) (No. 01-1351) ("This Court has repeatedly extended the meet-and-confer process, and by virtue thereof the date for the State's compliance, in hopes that the parties could reach agreement on how this Court can best ensure a durable solution to the prison population problem . . . It now appears that no such agreement will be reached.").

231. *See* Defendants' Amended Application and [Proposed] Order Granting Defendants' Request for an Extension of April 18, 2004 Deadline at 3, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2014), (No. 01-1351); Defendants' Order Granting Defendants' Request for

B. The Three–Judge Court Gets Serious: New Enforcement Mechanisms, a Compliance Monitor, and No Further State Appeals

On February 10, 2014 the three-judge court issued an order granting the State’s request for a two-year extension to meet the 137.5 percent cap.²³³ The new order requires the State to reduce the prison population in three stages, or “benchmarks:” June 30, 2014, February 28, 2015, and finally February 28, 2016.²³⁴

For the first time the order provides for the appointment of a Compliance Officer who will monitor whether the State meets these benchmarks.²³⁵ If the State fails to successfully meet a benchmark within thirty days of its expiration, the Compliance Officer will direct the release of the number of inmates necessary to bring the State into compliance with the mandated population reduction level.²³⁶ Furthermore, in exchange for the two-year extension, the State has agreed that it will not appeal the order granting the extension, subsequent related orders, or any order issued by the Compliance Officer.²³⁷

an Extension of April 18, 2004 Deadline at 1, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2014) (No. 01-1351).

232. See Objections to Defendants’ Jan. 23, 2014 Proposed Order Re Extension of Crowding Reduction Deadline at 2, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2014) (No. 01-1351); Plaintiffs’ Proposed Order Submitted in Response January 13, 2014 Order at 1, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2014) (No. 01-1351).

233. See Order Granting in Part and Denying in Part Defendants’ Request for Extension of December 31, 2013 Deadline, *supra* note 20, at 2.

234. *Id.* (the state must reduce the population to 143 percent of design capacity by June 30, 2014, 141.5 percent of design capacity by February 28, 2015, and 137.5 percent design capacity by February 28, 2016).

235. *Id.* at 4; Opinion Re: Order Granting in Part and Denying in Part Defendants’ Request for Extension of December 31, 2013 Deadline, *supra* note 20, at 3. Consistent with the role of this new Compliance Officer, the court made a point in stating that the release of prisoners may not impair public safety: “Since 2009, more and more states have come to recognize that, properly handled, the release of prisoners held past the time necessary to serve the purposes of their incarceration will not result in danger to the community, but rather may actually benefit both the prisoners and their communities.” Opinion Re: Order Granting in Part and Denying in Part Defendants’ Request for Extension of December 31, 2013 Deadline, *supra* note 20, at 2. On April 9, 2014, the three-judge court appointed Elwood Lui, a former associate justice of the California Court of Appeal, as the new Compliance Officer. See Order Appointing Compliance Officer at 1, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2014), (No. 01-1351); Sam Stanton, *Judges Appoint Prison Population Oversight Chief*, SACRAMENTO BEE, Apr. 23, 2014, available at <http://www.sacbee.com/2014/04/09/6311041/judges-appoint-prison-population.html>.

236. *Id.*

237. Order Granting in Part and Denying in Part Defendants’ Request for Extension of December 31, 2013 Deadline, *supra* note 20, at 3–4 (“[D]efendants have represented to this

The order stated that in order to meet these benchmarks, the State 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.”²³⁸ The State also agreed to immediately implement the following population reduction measures:

- (a) Prospectively increase good-time credits for non-violent second-strike offenders to 33 percent and minimum custody prisoners to two-for-one;
- (b) Implement a new parole determination process making second-strikers eligible for parole after serving 50 percent of their sentence;
- (c) Parole inmates who have already been granted parole but have future parole dates;
- (d) Expand parole for medically infirm prisoners;
- (e) Expand parole for elderly inmates who are sixty years of age or older and have served a minimum of twenty-five years of their sentence;
- (f) Activate new reentry hubs at thirteen designated prisons;
- (g) Pursue the expansion of county-level reentry programs;
- (h) Expand the alternative custody program for female prisoners.²³⁹

Court that, if a two year extension is granted, they will not appeal or support an appeal of the order granting the extension, or of any of its provisions; nor will they appeal or support the appeal of any subsequent order necessary to implement the extension order or any of its provisions, nor any order issued by the Compliance Officer pursuant to the authority vested in him by the extension order; nor will they move or support a motion to terminate any relief provided for or extended by the extension order or any of its provisions until at least two years after the date of the extension order and such time as it is firmly established that compliance with the 137.5% design capacity benchmark is durable.”).

238. *Id.* at 3.

239. *Id.*; *see* Order Granting in Part and Denying in Part Defendants’ Request for Extension of December 31, 2013 Deadline, *supra* note 20, at 3 (“Defendants shall also immediately implement the following measures: (a). . . Non-violent second-strikers will be eligible to earn good time credits at 33.3% and will be eligible to earn milestone credits for completing rehabilitative programs. Minimum custody inmates will be eligible to earn 2-for-1 good time credits to the extent such credits do not deplete participation in fire camps . . . ; (b) Create and implement a new parole determination process through which non-violent second-strikers will be eligible for parole consideration by the Board of Parole Hearings once they have served 50% of their sentence; (c) Parole certain inmates serving indeterminate sentences who have already been granted parole by the Board of Parole Hearings but have future parole dates; (d) In consultation with the Receiver’s office, finalize and implement an expanded parole process for medically incapacitated inmates; (e) Finalize and implement a new parole process whereby inmates who are 60 years of age or older and have served a minimum of twenty-five years of their sentence will be referred to the Board

In addition, despite the authorization granted under SB 105, the order prohibits the State from increasing the population of out-of-state prisoners above the current level of approximately 8,900 prisoners.²⁴⁰ This means that prisoners may still be transferred to other states to replace other out-of-state prisoners who are released or returned to California, but the total number of California prisoners housed in out-of-state prisons shall not increase.

Though many of these new population reduction measures announced in the February 2014 order focus on reducing the number of prisoners,²⁴¹ the State is also still very obviously focused on increasing capacity wherever it can, as evinced by the new funding and authorizations contained in SB 105,²⁴² discussed above. In a March 2014 status report, the State informed the three-judge panel that its prison population was about 502 inmates above the upcoming June 30 benchmark.²⁴³ The State indicated that it anticipated getting below the 143 percent mark before the deadline by utilizing some of the contract prison cells SB 105 authorized.²⁴⁴

In its February 2014 order, the three-judge court appeared optimistic that the State “belated as it may be” is ready to move toward a durable solution to the prison overcrowding crisis.²⁴⁵ In addition, the language used by the three-judge court is more forceful than in any previous order in the case:

We recognize that these measures should have been adopted much earlier, that plaintiffs’ lawyers have made unceasing efforts to obtain immediate relief on behalf of their clients, and that California prisoners deserve far better treatment than they have received from defendants over the past four and a half years.

of Parole Hearings to determine suitability for parole; (f) Activate new reentry hubs at a total of 13 designated prisons to be operational within one year from the date of this order; (g) Pursue expansion of pilot reentry programs with additional counties and local communities; and (h) Implement an expanded alternative custody program for female inmates.”).

240. *Id.* at 2.

241. See Order Granting in Part and Denying in Part Defendants’ Request for Extension of December 31, 2013 Deadline, *supra* note 20; Opinion Re: Order Granting in Part and Denying in Part Defendants’ Request for Extension of December 31, 2013 Deadline, *supra* note 20.

242. See S.B. 105, *supra* note 11.

243. Status Report at Exhibit B at 1, Plata v. Brown, 922 F. Supp. 2d 1004 (E.D. Cal. 2014) (No. 01-1351), available at <http://www.cdcr.ca.gov/News/docs/3JP-March-2014/March-2014-Status-Report.pdf>.

244. *Id.*

245. Opinion Re: Order Granting in Part and Denying in Part Defendants’ Request for Extension of December 31, 2013 Deadline, *supra* note 20, at 3.

Similarly, California's citizens have incurred far greater costs, both financial and otherwise, as a result of defendants' heretofore unyielding resistance to compliance with this Court's orders. Finally, we recognize that this Court must also accept part of the blame for not acting more forcefully with regard to defendants' obduracy in the face of its continuing constitutional violations. Nevertheless, resolving the conditions in California prisons for the long run, and not merely for the next few months, is of paramount importance to this Court as well as to the people of this State.²⁴⁶

C. The State's Continued Stinginess with Rehabilitative Credits

As noted above, in exchange for the two-year extension to comply with the population cap, the State agreed to file no further appeals, develop "comprehensive and sustainable prison population-reduction reforms," and implement immediate population reduction measures, including, prospectively increasing good-time credits for non-violent, second-strike and minimum custody prisoners.²⁴⁷ This change, along with other increases to prisoners' credit-earning potential, could significantly decrease the length of stay for non-violent felonies. For instance, the Legislature could increase the total number of weeks of credit a prisoner can earn for participation in programs. In 2009, the Legislature allowed the CDCR to grant six weeks of credit per year prisoner for every program completed.²⁴⁸ While the granting of such credits is consistent with the practices of other states and the recommendations given to the CDCR and the Legislature by a panel of corrections experts, the amount of credits awarded is far lower than the three-to-twelve months of credit allowed by most states and the four-to-six months recommended by an expert panel appointed by CDCR.²⁴⁹

246. *Id.* at 4.

247. Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013 Deadline, *supra* note 20, at 2-3; Opinion Re: Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013 Deadline, *supra* note 20, at 3.

248. See S.B. 18, 2009-2010 Leg., Reg. Sess. (Cal. 2009); CAL. PENAL CODE § 2933.05.

249. In response to the California Budget Act of 2006-2007, the CDCR created a panel of nationally recognized corrections experts to: (1) complete an assessment of California's adult prison and parole programs designed to reduce recidivism and (2) provide recommendations for improving programming in California's prison and parole system. In addition, the expert panel offered suggestion on how the CDCR could meet the benchmarks established by AB 900, the Public Safety and Offender Rehabilitation Services Act of 2007. See A ROADMAP FOR EFFECTIVE OFFENDER PROGRAMMING IN CALIFORNIA, CAL. DEP'T OF CORRS. & REHABILITATION 12, 92-93 (Jun. 30, 2007), available at http://www.cdcr.ca.gov/News/Press_Release_Archive/2007_Press_Releases/Press20070629

The State could not only expand program credits for eligible prisoners, but could also grant more prisoners the opportunity to participate in credit-eligible programming. In addition, the State could apply the expanded credits retroactively to prisoners who have already completed programs. This would have an immediate, significant, and ongoing impact on the prison population numbers.

In light of the limited program resources available in CDCR facilities,²⁵⁰ the State could also provide credits to low risk prisoners who maintain a good conduct record and maintain a work assignment if one is available, even if they do not complete eligible programs. As the expert panel's report pointed out, requiring low risk prisoners to participate in unnecessary rehabilitative programs can increase their recidivism rates.²⁵¹ It would therefore improve public safety to provide low risk prisoners with additional credits for good behavior, rather than requiring counter-productive program completion. Such a reform would also free space in rehabilitative programs for those prisoners who are more likely to benefit.

Expanding and refining the use of rehabilitative programming credits can be an important tool to regulate the prison population and encourage prisoners to participate in meaningful risk reduction programs.²⁵² In pleadings submitted in the *Plata* litigation, the State identified several categories of reforms that would further reduce the 137.5 percent cap.²⁵³ These include the extension of some good time

.html [hereinafter ROADMAP].

250. See CAL. DEP'T OF CORRS. & REHABILITATION, THE FUTURE OF CALIFORNIA CORRECTIONS: A BLUEPRINT TO SAVE BILLIONS OF DOLLARS, END FEDERAL COURT OVERSIGHT, AND IMPROVE THE PRISON SYSTEM 21 (April 23, 2012) Appendix, available at <http://www.cdcr.ca.gov/2012plan/docs/plan/complete.pdf>.

251. See ROADMAP, *supra* note 249, at 23.

252. Risk reduction programs are "intended to reduce risk factors associated with antisocial behavior of offenders, and thus make them less likely to commit further criminal offenses. . . . Risk reduction programs are those programs that would be judged successful, or not, based on their impact on recidivism by participants." JESSE JANNETTA, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION RECIDIVISM REDUCTION PROGRAM INVENTORY 2 (Apr. 30, 2007), available at <http://ucicorrections.seweb.uci.edu/files/CDCR%20Recidivism%20Reduction%20Program%20Inventory.pdf>.

253. See Amended Defendants' Response to April 11, 2013 Order Requiring List of Proposed Population Reduction Measures; Court-Ordered Plan, *supra* note 209; Defendants' Response to October 11, 2012 Order to Develop Plans to Achieve Required Prison Population Reduction at 8, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2013) (No. 01-1351). See also *California Files Court-Ordered Prison Plan, Vows Supreme Court Appeal*, CDCR TODAY (May 2, 2013), <http://cdcrtoday.blogspot.com/2013/05/california-files-court-ordered-prison.html> (quoting CDCR Secretary Jeff Beard's statement that the State's population reduction plan was submitted under protest).

credits that the state was ordered to implement by the three-judge court.²⁵⁴ According to its own estimates, the State could reduce the prison population by 1,578 persons if it expanded the rate at which prisoners could earn credits and the populations of prisoners eligible to earn credits.²⁵⁵ However, the State has not implemented the two-for-one credit-earning reforms for minimum security prisoners that are mandated by the three-judge court.²⁵⁶

V. BEYOND REALIGNMENT: SHIFTING THE PARADIGM WILL REQUIRE SENTENCING REFORM TO REDUCE THE NUMBER OF NON-SERIOUS, NON-VIOLENT OFFENSES PUNISHED AS FELONIES, AND THE LENGTH OF SENTENCES IMPOSED FOR THEM

Realignment does not adequately address a fundamental cause of the prison overcrowding crisis: California's excessive sentences, especially for non-serious, non-violent crimes. Realignment did not change the length of sentences that can be imposed for the "realigned" offenses, the applicability of sentencing enhancements, or the fact that these offenses remain felonies. Even under Realignment, anyone previously convicted of a serious or violent felony, no matter how long ago, will still be sent to prison, not jail, when sentenced to a period of incarceration for *any* new felony, no matter how minor. Under California's harsh three strikes laws, the "realigned" non-serious and

254. Amended Defendants' Response to April 11, 2013 Order Requiring List of Proposed Population Reduction Measures; Court-Ordered Plan, *supra* note 209; Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013 Deadline, *supra* note 20, at 2-3; Opinion Re: Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013 Deadline, *supra* note 20, at 3.

255. CDCR estimates show that the expansion of "two-for-one" credits to minimum custody prisoners will reduce the population by 257 individuals. Extending the credit-earning cap from six to eight weeks for violent, serious, and second-strike offenders would reduce the population by an additional 554 prisoners. Furthermore, if the credit-earning capacity for violent and second-strike felons was increased to thirty-four percent, from their current caps of fifteen percent and twenty percent respectively, the State estimates that the prison population will be reduced by 767 prisoners. *Id.* at 9-11, 22-23.

256. According to the May 15, 2014 Status Report to the three-judge court, the State has thus far refused to increase the prospective credit earning rates of minimum custody prisoners to the three-judge court mandated level. *See* Defendants' May 2014 Status Report in Response to February 10, 2014 Order at Exhibit B, *Plata v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2014), (No. 01-1351) ("With respect to two-for-one credit earning for minimum custody inmates, the State continues to evaluate this population reduction tool in light of fire camp participation rates.").

non-violent felonies can still trigger long prison sentences.²⁵⁷ Moreover, the Legislature purposefully excluded fifty-nine non-serious, non-violent crimes the Brown Administration originally proposed to realign; many continue serving sentences for these crimes in state prison.²⁵⁸ Even those sent to jail instead of prison under Realignment are still subject to the same excessive sentences and enhancements as existed before Realignment, which can result in sentences of ten years or more served in jails never designed to house prisoners for such extended periods of incarceration, raising serious constitutional concerns and further exacerbating overcrowding in county jails.²⁵⁹

The State's acknowledgement that Realignment alone can never sufficiently reduce the prison population,²⁶⁰ in conjunction with the extraordinary new *Plata* enforcement mechanisms,²⁶¹ could provide unprecedented impetus for sentencing reform. The Compliance Monitor can order prisoners released early if the population

257. Even after the enactment of the 2012 Prop. 36 ballot initiative, the second-strike provision of the Three Strikes law still requires double length sentences for defendants convicted of any new felony, who have one prior serious or violent felony conviction. *See* CAL. PENAL CODE §§ 667(d)(1), (e)(1); *infra* Section V.A.1.

258. *See* SENATE BILL 105 INTERIM REPORT, *supra* note 21, at 14. The Report states that concerns from law enforcement were a significant factor in the legislature not realigning these crimes. *Id.*; *see also* AB 109 Crime Exclusions List, *supra* note 15 (listing crimes that are not defined in the Penal Code as serious or violent offenses, yet still must be served in state prison, rather than in local custody, after the implementation of Realignment).

259. *See, e.g.*, CAL. PENAL CODE § 667.5(b) (enhancement adding to sentences for new offenses based on prior convictions resulting in prison sentences); CAL. PENAL CODE § 11370.4 (enhancements adding to sentences for controlled substance offenses based upon weight of controlled substance involved in offense). These are but two examples of many. According to a 2007 report from the Little Hoover Commission, "Today, there are more than 1,000 felony sentencing laws and more than 100 felony sentence enhancements across 21 separate sections of California law." LITTLE HOOVER COMM'N, *supra* note 75, at 34. *See also* JOAN PETERSILIA, ET. AL., VOICES FROM THE FIELD, *supra* note 90, at 120 ("Realigned felonies carry longer sentences than misdemeanors and are subject to enhancements that may add up to sentences of a decade or more. In Los Angeles County one inmate has been sentenced to 42 years in county jail The longest jail sentence imposed in Riverside County to date is 12 years and two months.").

260. *See, e.g.*, Defendant's Response to October 11, 2012 Order to Develop Plans to Achieve Required Prison Population Reduction, *supra* note 25 at 1; Defendant's Motion to Vacate or Modify Population Reduction Order, *supra* note 5, at 1. *See also* *Three-Judge Court Updates*, *supra* note 25; *See* Declaration of James Austin in Support of Plaintiffs' Statement in Response to October 11, 2012 Order Regarding Population Reduction, *supra* note 18, at 2.

261. Opinion Re: Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013 Deadline, *supra* note 20, at 3.

benchmarks are not met on time,²⁶² a result the State is highly motivated to avoid.

On the other hand, the state coffers are in much better shape now than in 2011.²⁶³ As SB 105 demonstrates, the state now has money and a willingness to spend it to increase prison capacity.²⁶⁴ The fight between Senate Democrats and Governor Brown over AB 84 and SB 105 was in essence about choices for how to comply with *Plata*: AB 84 focused more on providing new funding to further Realignment's stated intent to rehabilitate rather than punish for non-violent, non-serious offenses, thereby reducing recidivism and the number of people being sent to prison.²⁶⁵ The Governor's plan focused more on building additional capacity so the State can decrease the prison population to 137.5 percent of design capacity without significantly further reducing the numbers of prisoners.²⁶⁶ SB 105 represents a compromise between these different approaches;²⁶⁷ those seeking to increase capacity appear to have gotten the better end of the deal.

Almost entirely absent from the SB 105 debate, however, was any discussion about broader sentencing reforms.²⁶⁸ A largely overlooked provision of AB 84 would have established the California Public Safety Commission, a permanent, advisory state government agency.²⁶⁹ The Commission would have been tasked with providing information and developing recommendations for the Legislature and the Governor,

to assist with prison population management options consistent with public safety, to assist with effective correctional practices and the effective allocation of public safety resources, *to develop recommendations for the Legislature and the Governor to consider regarding criminal sentences and evidence-based programming for criminal offenders*, and to develop recommendations for the Legislature and the Governor to consider sentencing credits.²⁷⁰

262. See Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013 Deadline, *supra* note 20, at 2; Opinion Re: Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013 Deadline, *supra* note 20, at 3.

263. See, e.g., LEG. ANALYST'S OFFICE, THE 2013-14 BUDGET, *supra* note 218.

264. See S.B. 105, *supra* note 11.

265. A.B. 84, *supra* note 221.

266. S.B. 105, *supra* note 11 (introduced Aug. 27, 2013).

267. S.B. 105, *supra* note 11 (approved by the Governor Sept. 12, 2013).

268. *Id.*

269. A.B. 84, *supra* note 221.

270. *Id.* (emphasis added).

This language was consistent with the statement in the *Plata* three-judge court's February 2014 order that, among the steps the State had agreed to take was, "considering the establishment of a commission to recommend reforms of state penal and sentencing laws."²⁷¹ Similarly, when Governor Brown vetoed a bill in late 2013 that would have reduced low-level drug possession offenses to wobblers instead of felonies, his veto message stated,

Under SB 105, we are going to examine in detail California's criminal justice system, including the current sentencing structure. We will do so with the full participation of all necessary parties, including law enforcement, local government, courts and treatment providers. That will be the appropriate time to evaluate our existing drug laws.²⁷²

SB 105, however, contains no provision requiring the state to, "examine in detail California's criminal justice system, including the current sentencing structure." Quite the contrary, SB 105 *eliminated* the sentencing commission that would have been created under SB 84.²⁷³ Instead, according to the Legislative Counsel's Digest for SB 105, it requires "the administration to assess the state prison system, including capacity needs, prison population levels, recidivism rates, and factors effecting crime levels, and to develop recommendations on balanced solutions that are cost effective and protect public safety."²⁷⁴

SB 105 says nothing explicit about a sentencing commission or sentencing reform.²⁷⁵ The bill did, however, require the DOF to submit the administration's interim report about SB 105 implementation to the Legislature by April 1, 2014, and to submit a final report to the Legislature not later than January 10, 2015.²⁷⁶ The first Interim Report reveals much about the Brown Administration's priorities when it comes to implementing SB 105 and complying with *Plata*.²⁷⁷ The only mention of sentencing reform in this report—which largely focuses on descriptions of the prison population and efforts underway to increase prison capacity²⁷⁸—occurs near the end, in a long list of items

271. Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013 Deadline, *supra* note 20, at 3.

272. *Veto Message for S.B. 649*, *infra* note 361 (emphasis added); *see* further discussion of SB 649 in Section V.B.1.c., *infra*.

273. S.B. 105, *supra* note 11; A.B. 84, *supra* note 221.

274. S.B. 105, *supra* note 11.

275. *Id.*

276. *Id.*

277. SENATE BILL 105 INTERIM REPORT, *supra* note 21.

278. *Id.* at 19 (the report provides the following details about steps taken and planned to

suggested by various stakeholders the DOF interviewed for the report.²⁷⁹ This list is characterized as, “topics that require further discussion.”²⁸⁰ The interviewed stakeholders suggested several sentencing reform-related topics, including: review the current felony sentencing structure; examine the statewide variation in the use of split sentences; determine the impact of stacking terms during sentencing; examine the impact of second-strike sentences on the prison population; review existing drug laws and retroactive changes to drug laws; and review the number of offenders in prison for non-violent and drug crimes.²⁸¹ In the Section immediately following entitled, “Efforts Currently Underway,” the report says only that, “The Legislature and Governor have already begun addressing some of these issues and the Administration has several proposals before the Legislature that are consistent with some of the topics raised.”²⁸²

In other words, neither the Governor nor the Legislature has yet taken any concrete steps to consider, much less enact, substantive sentencing reform to reduce any penalties or sentence lengths. Indeed, there are serious discussions underway in Sacramento to roll back Realignment by creating new exemptions to send *more* people to state prison.²⁸³ As noted earlier, even those sent to jail instead of prison for non-serious, non-violent offenses are still subject to the same excessive sentences and enhancements as existed before Realignment, which can result in sentences of ten years or more served in jails.²⁸⁴ In 2012, State Senator Bill Emerson, in collaboration with District Attorney Paul Zellerbach of Riverside County introduced legislation to require all

increase capacity: “The state’s current design capacity is for 81,574 inmates. The activation of the DeWitt Nelson Correctional Annex in the spring of 2014 will add 1,133 beds, increasing the capacity to 82,707. An additional 2,376 beds will be activated in early 2016, when the three dormitory infill projects are complete at Mule Creek State Prison and Richard J. Donovan Correctional Facility, increasing the capacity to 85,083. The Department has 4,480 fire camp beds that are not included in the prison capacity noted above. Applying the court-imposed population cap of 137.5 percent of design capacity will allow the state to house 116,989 inmates in its prisons in February 2016. The Department’s total adult inmate population as of March 12, 2014, was 134,801, of which 117,153 were housed in the Department’s adult institutions, and the remaining 17,648 were housed in fire camps or contract beds.”).

279. *Id.* at 27–29.

280. *Id.*

281. *Id.* at 28.

282. *Id.* at 29.

283. S.B. 1441, 2011–2012 Leg., Reg. Sess. (Cal. 2012); *see also, e.g.*, A.B. 601, 2013–2014 Leg., Reg. Sess. (Cal. 2014) (introduced Feb. 10, 2014); A.B. 2590, 2013–14 Leg., Reg. Sess. (Cal. 2014) (introduced Feb. 21, 2014).

284. *See supra* note 259; *see also* CAL. PENAL CODE § 1170(h) (West 2014).

sentences of three years or more to be served in state prison rather than county jail.²⁸⁵ The bill failed but Zellerbach is determined to reintroduce it.²⁸⁶ Others have proposed similar legislation to send those sentenced to long terms—because of weight-based enhancements for drug crimes—to state prison instead of jail.²⁸⁷ Governor Brown has also recently suggested amending Realignment to allow persons with these long sentences to once again be sent to prison instead of jail.²⁸⁸ No one appears to be asking the obvious question: Why are we incarcerating people for such lengthy periods for non-serious, non-violent offenses, especially people who have *never committed a violent or serious offense*? Only such persons can be sent jail instead of prison under current Realignment law, since anyone with any prior conviction for a serious or violent felony is not eligible for a jail sentence instead of state prison.²⁸⁹

In October 2012 the State bluntly told the *Plata* three-judge court that the 137.5 percent cap “cannot be achieved unless the Court alters state law.”²⁹⁰ This statement is only half true. State sentencing laws must be changed. But the State’s assertion that only the federal courts have the power to do so is false. The Legislature and the Governor can enact legislation to reform California sentencing laws, including reducing the penalties for low-level, non-violent drug and property

285. S.B. 1441, *supra* note 283.

286. JOAN PETERSILIA, ET. AL., VOICES FROM THE FIELD, *supra* note 90, at 120.

287. *Id.* (“Assistant District Attorney Karen Meredith of Alameda County also advocates legislation to limit jail sentences, but suggests doing so by diverting drug offenders subject to weight clause enhancements to prison, citing this group as a major source of excessive jail terms.”).

288. Don Thompson, *Counties tell Gov. Brown They Need Money for Jail Realignment*, ASSOCIATED PRESS, Apr. 19, 2014, available at <http://www.scpd.org/news/2014/04/19/43615/counties-tell-gov-brown-they-need-money-for-jail-r/> (“In Kern County, Sheriff Donny Youngblood worries that county jails built to hold criminals for no more than a year are now housing inmates for a decade or more. Brown has proposed modifying his realignment law so that inmates sentenced to more than 10 years would again serve their time in state prisons, but Youngblood thinks the sentence length should be shorter. ‘Three years, from my standpoint, might be reasonable,’ he said.”).

289. CAL. PENAL CODE § 1170(h)(3) (West, 2014).

290. See Defendant’s Response to October 11, 2012 Order to Develop Plans to Achieve Required Prison Population Reduction, *supra* note 25, at 1–2 ; Defendant’s Motion to Vacate or Modify Population Reduction Order, *supra* note 5, at 2. See also *Three-Judge Court Updates*, CAL. DEP’T OF CORR. & REHAB., http://www.cdcr.ca.gov/News/3_judge_panel_decision.html (compiling updated figures). This stark admission that Realignment alone is not sufficient to meet the court’s population cap requirement confirmed what the plaintiffs’ experts had already known to be true. See Declaration of James Austin in Support of Plaintiffs’ Statement in Response to October 11, 2012 Order Regarding Population Reduction, *supra* note 18, at 2.

crimes. In the following Section, we propose specific reforms and describe the dramatic impact they would have on prison and jail populations.

A. *Specific Sentencing Reform Proposals*

1. *The Legislature or the Voters Could Extend Proposition 36–
Like Reforms to Second-Strikers*

The stated intent of California’s 1994 Three Strikes laws was the assurance of “longer prison sentences and greater punishment for those who commit a felony and have previously been convicted of serious and/or violent felony offenses.”²⁹¹ This goal is achieved primarily through long mandatory sentences for those with prior serious felony convictions when convicted of any new felony. Individuals convicted of any new felony with two or more prior “serious”²⁹² or violent felony convictions, were sentenced to an indeterminate term of life imprisonment with a minimum term calculated as the greater of: three times the usual sentence; twenty-five years; or the term pursuant to California Penal Code § 1170, including any applicable sentencing enhancements.²⁹³ The triggering offense could be any felony, including simple drug possession or petty theft.²⁹⁴ Admissible prior offenses included out-of-state felonies²⁹⁵ and juvenile convictions.²⁹⁶ There was, moreover, no requirement that the previous offense be one for which

291. CAL. PENAL CODE §§ 667(b), 1170.12.

292. “Serious” felonies range anywhere from purse-snatching to murder under the definition provided in the California Penal Code. *Id.* § 1192.7(c).

293. *Id.* § 667(e)(2)(A).

294. There are vast examples of minor triggering offenses. *See, e.g., Ewing v. California*, 538 U.S. 11 (2003) (stealing golf clubs); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (shoplifting 5 video tapes).

295. *See* 1994 Cal. Stat. ch. 12, § 1 (AB 971) (the “Three Strikes” legislation that enacted CAL. PENAL CODE § 667); Proposition 184. CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION (Nov. 8, 1994) (the original “Three Strikes” ballot initiative). *See also People v. Warner*, 139 P.3d 475 (Cal. 2006) (prosecution must prove that the out-of-state offense contains all the elements to qualify as serious or violent in California); *People v. Hazelton*, 926 P.2d 423 (Cal. 1996) (holding that the same applies for Section 1170.12).

296. *See* 1994 Cal. Stat. ch. 12, § 1 (AB 971); Proposition 184. CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION (Nov. 8, 1994). To be counted as a strike, the statute requires that the offender had been 16 or older at the time of the juvenile offense; that the offense is listed under Section 707(b) of the Welfare Institutions Code; that the offender had been found fit and proper under the juvenile court law; and that the offender was adjudicated a ward of the juvenile court. The use of prior juvenile convictions has been upheld for three-strike purposes even though juvenile adjudications do not afford the defendant a jury trial. *People v. Nguyen*, 209 P.3d 946 (Cal. 2009).

the defendant had served a sentence in a state prison.²⁹⁷

In November 2012, voters in California—by a two-to-one margin—passed Proposition 36, the “Three Strikes Reform Act of 2012,” which revises the state’s 1994 Three Strikes scheme.²⁹⁸ Proposition 36 precludes minor, non-violent crimes—like drug possession or low-level property crimes—from counting as third strikes and triggering life sentences.²⁹⁹ Proposition 36 does nothing, however, to address the much larger population of second strikers who are also serving disproportionate sentences for non-serious, non-violent triggering offenses.³⁰⁰ The original Three Strikes law mandates that defendants convicted of any new felony, with one prior serious or violent felony conviction,³⁰¹ must receive a sentence twice that for the usual felony conviction.³⁰²

According to the April 1, 2014 S.B. 105 DOF Interim report to the Legislature, as of June 2013, there were a total of 34,699 offenders serving a second-strike sentence in state prison.³⁰³ Of that total, 14,460 inmates were serving sentences for non-serious, non-violent, and non-sex offenses, with the two of the three most common controlling offenses being Possession of a Controlled Substance (1,817) and Possession of a Controlled Substance for Sale (1,698).³⁰⁴ The DOF report also notes that, since Realignment went into effect, some counties are now sending significantly more people to state prison on second-strike sentences than before.³⁰⁵ In the eight months prior to Realignment, total second strike admissions were 5,026, while

297. See 1994 Cal. Stat. ch. 12, § 1 (AB 971); Proposition 184. CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION (Nov. 8, 1994).

298. *Prop. 36*, *supra* note 67. Prior to Proposition 36, a third strike offense did not need to be serious or violent, and, instead, could be any felony including simple drug possession or petty theft. Now, as modified by Proposition 36, only violent felonies count as a third strike, under which a 25-years-to-life sentence may be imposed. CAL. PENAL CODE §§ 667(e)(2)(A)(ii), 1170.12(c)(2)(A)(ii). See also David Mills & Michael Romano, *The Passage and Implementation of the Three Strikes Reform Act of 2012 (Proposition 36)*, 25 FEDERAL SENTENCING REPORTER 265 (2013).

299. See *Prop. 36*, *supra* note 67; CAL. PENAL CODE §§ 667(e)(2)(A)(ii), 1170.12(c)(2)(A)(ii).

300. *Id.*

301. See CAL. PENAL CODE § 667(d)(1) (defining these felonies). Prior convictions for these purposes are violent felonies defined under § 667.5(c) or serious felonies defined under § 1192.7(c). These offenses include: murder, mayhem, various sexual crimes, arson, kidnapping, robbery, etc.

302. *Id.* § 667(e)(1).

303. SENATE BILL 105 INTERIM REPORT, *supra* note 21, at 4.

304. *Id.*

305. *Id.*

second strike admissions were 6,059 during an eight month period two years later, representing a 20 percent increase.³⁰⁶ Among the more significant second strike admission increases were a 55 percent increase for Possession of a Controlled Substance.³⁰⁷

Reforming the second-strike provision in a manner similar to the third-strike reforms of Proposition 36 would require either a two-thirds majority vote of both houses of the Legislature or another voter initiative.³⁰⁸ For the first time since 1883, California democrats have a super majority in both houses and could, theoretically, change the Three Strikes law.³⁰⁹ However, it appears extremely unlikely they will do so given, as discussed below, the Legislature's rejection of other much more modest sentencing reforms.³¹⁰

2. *The Governor and Attorney General Could Expedite and Assist Review of Current Prisoners' Cases Eligible for Retroactive Application of Proposition 36*

Proposition 36 also includes a limited retroactive resentencing provision that allows any already-sentenced prisoner serving an indeterminate life sentence for a non-serious, non-violent third-strike to

306. *Id.*

307. *Id.*

308. See CAL. PENAL CODE §§ 667(j), 1170.12(g). A critically important aspect of the Three Strikes ballot initiative for our purposes is its specific provision (section 4) that allows it to be amended or repealed only by a two-thirds legislative supermajority or another voter initiative. See Erik G. Luna, *Foreword: Three Strikes in a Nutshell*, 20 T. JEFFERSON L. REV. 1, 9 (1998).

309. See *Senators*, CAL. STATE SEN., <http://senate.ca.gov/senators>; *MEMBERS*, CAL. STATE ASSEMB. <http://assembly.ca.gov/assemblymembers>. See also Rick Orlov and Andrew Edwards, *California's Democratic Supermajority Promises Not to Abuse New Power*, LA DAILY NEWS (Dec. 4, 2012), http://www.huffingtonpost.com/2012/12/04/california-democratic-supermajority_n_2237991.html.

310. As the time this article was submitted for publication, a new sentencing reform ballot initiative had been issued a title and summary by the Attorney General for circulation to gather signatures to qualify for inclusion in the 2014 election. See *Initiatives and Referenda Cleared for Circulation*, CAL. SEC'Y OF STATE, available at <http://www.sos.ca.gov/elections/ballot-measures/cleared-for-circulation.htm> (showing that initiative 13-0060: "Criminal Sentences, Misdemeanor Penalties, Initiative Statute" received title and summary from the Attorney General and was cleared for circulation). The proponents are San Francisco District Attorney and former Police Chief George Gascon and former San Diego Police Chief William Lansdowne. *Id.* The initiative would reduce the felonies and wobblers discussed above, as well as some others, to misdemeanors for most defendants, excluding only those defendants with specified serious prior felonies. *Id.* In addition, the legislative analyst found that the fiscal impact would result in criminal justice savings in the low hundreds of millions of dollars annually at both the state and county levels. *Id.*

petition for a recall of his or her sentence.³¹¹ The original sentencing court will conduct a hearing to determine whether to retroactively impose a new sentence consistent with the prospective sentencing rules created by Proposition 36.³¹²

Under this retroactive resentencing provision, currently incarcerated eligible third-strikers are entitled to file petitions within two years of the implementation of Proposition 36.³¹³ As of April 2014, 1,613 prisoners had been released from custody under Proposition 36.³¹⁴ Approximately 1,500 additional prisoners were eligible for relief under Proposition 36 and waiting to have their cases reviewed in county courts.³¹⁵ In Los Angeles County alone, 651 cases of inmates eligible for relief under Proposition 36 had yet to be processed.³¹⁶ Prisoners released under Prop. 36 have thus far demonstrated they pose little threat to public safety. According to a report from Stanford University, “CDCR data shows that the recidivism rate of prisoners released under Proposition 36 is 1.3 percent. By comparison, the recidivism rate of all other inmates released from prison over the same period of time is over 30 percent. ... Those released pursuant to Proposition 36 have a better recidivism rate than any other comparable cohort of prisoners released from CDCR custody.”³¹⁷ The same report found that Proposition 36 has already saved California over \$30 million dollars in prison costs, and is likely to save taxpayers over \$750 million over the next ten years.³¹⁸ Facilitated implementation of Proposition 36’s retroactivity provision could expedite the release of eligible prisoners. This could be achieved by, for instance, having the Attorney General’s office review the relevant files and recommend release even

311. *Prop. 36, supra* note 67, § 6; CAL. PENAL CODE § 1170.126.

312. *Id.*

313. *Id.*

314. *See Proposition 36 Progress Report: Over 1,500 Prisoners Released, Historically Low Recidivism Rate*, STANFORD LAW SCHOOL THREE STRIKES PROJECT, NAACP LEGAL DEFENSE AND EDUCATION FUND (Apr. 2014), *available at* <http://www.threestrikesproject.org>.

315. *See id.* at 3.

316. *See id.* at 1. Prisoners released under Prop. 36 have thus far demonstrated they pose little threat to public safety. According to a report from Stanford University, “The recidivism rate of prisoners released under Proposition 36 to date is well below state and national averages. Fewer than 2 percent of the prisoners released under Proposition 36 have been charged with new crimes, according to state and county records. By comparison, the average recidivism rate over a similar time period for non-Proposition 36 inmates leaving California prisons is 16 percent. Nationwide, 30 percent of inmates released from state prisons are arrested for a new crime within six months of release.” *Id.* at 1–2.

317. *Id.* at 1–2.

318. *Id.* at 3.

in the absence of, or prior to filing of, a petition from the prisoner.³¹⁹ Of course, the Governor could also order these prisoners released under his constitutional power to commute sentences.³²⁰

319. See Declaration of James Austin in Support of Plaintiffs' Statement in Response to October 11, 2012 Order Regarding Population Reduction, *supra* note 18.

320. CAL. CONST. art. V, § 8.

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Table 2. Primary Offense Sentenced Under the 2 and 3 Strikes Law as of August 2011 CDCR Prison Population

Source: CDCR

Crime	2 nd Striker		3 rd Striker	
	Prisoners	%	Prisoners	%
Totals	28,384	100%	8,576	100%
<i>Violence</i>	10,783	38%	2,996	35%
Homicide	986	3%	133	2%
Robbery	5,589	20%	2,004	23%
Assault & battery	3,401	12%	609	7%
Rape/sex crime	412	1%	161	2%
Other Crimes				
Person	395	1%	89	1%
<i>Property</i>	6,838	24%	2,585	30%
Burglary	3,602	13%	1,481	17%
Larceny	906	3%	338	4%
PT w/ priors	883	3%	363	4%
Other property	1,447	5%	403	5%
<i>Drugs</i>	4,773	17%	1,271	15%
Drug Sale/ Manufacture	2,092	7%	368	4%
Drug Possession	2,681	9%	903	11%
<i>Other Crimes</i>	5,990	21%	1,724	20%
Weapons	1,225	4%	429	5%
Neglect children	1,162	4%	176	2%
MV-Fleeing Accident	1,022	4%	393	5%
Bigamy/incest	1,012	4%	363	4%
Sex offender- registration	409	1%	139	2%
DUI	279	1%	53	1%
Obscene matter	19	0%	5	0%
Indecent exposure	28	0%	25	0%
Crime against dependent adult	72	0%	4	0%
Crime against public peace	17	0%	9	0%

Threat to government	139	0%	25	0%
Criminal threats	606	2%	103	1%

3. *The Legislature Could Reclassify Some Non-Serious, Non-Violent Wobblers and Felonies as Misdemeanors*

As noted above, reforming the second-strike provision of the original Three Strikes law would require either a two-thirds majority vote of both houses of the Legislature or another voter initiative.³²¹ However, the Legislature could reduce some felony and wobbler crimes to misdemeanors by simple majority vote. This would significantly reduce the second-strike prison population and reduce local jail populations.

As noted above, once a person has suffered one conviction for a serious or violent felony, *any* new felony conviction, even if not serious or violent, triggers a double-length sentence (second-strike).³²² Historically, many of California's long second- and third-strike sentences are triggered by felony convictions for minor low-level drug or property crimes that are either currently punishable as felonies or as "wobblers"—crimes which prosecutors have discretion to charge either as a felony or as a misdemeanor.³²³ Examples of wobblers that can lead to a felony conviction and trigger an increased sentence are simple possession of amphetamines, methamphetamine or hashish, some types of forgery,³²⁴ vandalism,³²⁵ writing bad checks,³²⁶ some minor theft crimes,³²⁷ and many other non-serious, non-violent crimes.³²⁸

321. See *supra* note 277; CAL. PENAL CODE §§ 667(j), 1170.12(g).

322. See *supra* note 277; CAL. PENAL CODE §§ 667(e)(1), 1170.12(c)(1).

323. See *supra* Table 2.

324. CAL. PENAL CODE §§ 470, 473.

325. *Id.* § 594(b)(1).

326. *Id.* § 476a(a).

327. See, e.g., *id.* §§ 487, 666 (defining grand theft). Section 487b may also be considered a minor theft crime, though it is punishable only as a felony. The offense has a low threshold: the conversion of real property \$250 or more in value.

328. CAL. HEALTH & SAFETY CODE § 11377(a) (West 2007); CAL. PENAL CODE §§ 470, 473, 476a(a), 487, 594(b)(1) 666. Other non-serious, non-violent wobblers include California Penal Code Section 460 (burglary in the second degree, or commercial burglary), California Vehicle Code Section 10851(a) (vehicle theft), and California Penal Code Section 470b (possession of forged driver's license or identification card). Although the offenses under California Penal Code Section 1320(b) (willful failure to appear in connection with a felony after release on own recognizance) and Section 1320.5 (willful failure to appear in connection with a felony after release on bail) are codified as felonies, both are punishable

If the Legislature reduced any of the non-serious, non-violent offenses that have historically triggered lengthy second- or third-strike sentences to misdemeanors, those convictions would no longer invoke the second-strike provision of the Three Strikes law,³²⁹ thereby reducing the prison population. In 2013, there were a total of 34,699 serving a second-strike sentence in California state prisons, of which 14,460 had triggering felonies that were non-serious, non-violent, and non-sex offenses.³³⁰

It is worth noting that even the federal government charges simple possession of controlled substances as a misdemeanor, not a felony.³³¹ Moreover, the federal Department of Justice has acknowledged the problems associated with long sentences for petty drug crimes and has recently taken steps to reduce mandatory minimums and otherwise lessen some of the long prison terms these offenses.³³² Similarly, the California Legislature has acknowledged that the wobblers are relatively minor crimes not worthy of felony status and state prison sentences. Wobblers can be charged as misdemeanors, subject to the discretion of the prosecutor.³³³ Moreover, all of these wobblers and low-level felonies are non-serious, non-violent crimes that the Legislature has now “realigned,” under AB 109, meaning sentences will be served in county jails rather than state prison (provided that defendants have no prior convictions for serious, violent, or sex offenses).³³⁴ It would be a relatively modest additional step for the Legislature to change the status of these offenses to misdemeanors.³³⁵

by either imprisonment in the county jail for not more than one year or imprisonment pursuant to subdivision (h) of California Penal Code Section 1170—the typical sentencing structure for a wobbler.

329. Since the implementation of Proposition 36, these non-serious, non-violent felonies no longer trigger the third-strike provision of the law. *See supra* note 267.

330. *See* SENATE BILL 105 INTERIM REPORT, *supra* note 21, at 4.

331. 21 U.S.C.A. § 844 (West 2014).

332. *See* DEP’T OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, ATTORNEY GENERAL HOLDER URGES CHANGES IN FEDERAL SENTENCING GUIDELINES TO RESERVE HARSHTEST PENALTIES FOR MOST SERIOUS DRUG TRAFFICKERS (Mar. 13, 2014), *available at* <http://www.justice.gov/opa/pr/2014/March/14-ag-263.html>.

333. *See* BERWICK, LINDENBERG & ROO, *supra* note 71, at 4 (defining wobblers as felonies which may be reduced to a misdemeanor under the discretion of a prosecutor, judge, or magistrate).

334. *See* J. Couzens and Bigelow, *supra* note 15, at 6–8 (listing the non-violent, non-serious felony offenses that are excluded from county jail sentences under Realignment).

335. Public support for such sentencing reform appears to be both broad and intense, according to public opinion research conducted by Tulchin Research. According to data from a Tulchin Research survey conducted in May 2012, nearly three-quarters (seventy percent) of likely California voters support reducing the penalty for simple possession of a small amount of drug for personal use from a felony to a misdemeanor. Memorandum from

The impact of this proposed sentencing reform is illustrated by considering the current number of state prisoners incarcerated for these low-level, non-serious, non-violent offenses. Over 25 percent of the state prison population (33,678) is currently serving a prison term for a non-serious and non-violent crime.³³⁶ Of this total, 11,471 inmates also do not have a conviction for a *prior* serious or violent crime (8 percent of the total prison population).³³⁷

B. Political Obstacles to Reform

The State's argument, in their *Plata* briefing, explaining why it is unacceptable to divert additional prisoners, convicted of drug possession, from state prison to local jails is telling. Rather than speaking in terms of statutory or constitutional impediments, the State said this:

The prison population could be reduced further if additional felonies, which are currently punishable by state prison (including drug possession, petty theft, second degree burglary, vehicle theft, and forgery), were instead treated as punishable by incarceration in county jail only. Assuming sentencing laws were changed and made effective after June 2013, the population could be reduced by 228 inmates by December 2013.

*This is another poor choice because counties are still working to implement their additional responsibilities under realignment. If any changes are implemented that require county jail incarceration, they should not be imposed by a federal court, but instead considered by the state Legislature, which can address the various stakeholders' concerns and determine whether these changes serve sound public safety and criminal justice objectives.*³³⁸

Perhaps there is some merit to the State's assertion that sentencing

Tulchin Research to Interested Parties 1 (May 21, 2012), *available at* https://www.aclunc.org/issues/criminal_justice/asset_upload_file19_10808.pdf. The

pollsters found that "an overwhelming majority of voters support reducing personal drug possession charges for drugs such as 'heroin, cocaine or methamphetamine' from a felony charge to a misdemeanor charge." *Id.* at 3. Moreover, forty-three percent strongly support the proposal, twenty-seven percent somewhat support, and twenty-seven percent oppose, with just three percent undecided on the matter. *Id.* Support for reform is extraordinarily widespread, encompassing solid majorities of Democrats (seventy-eight percent), independents (seventy-two percent), and Republicans (fifty-seven percent), as well as majorities of voters in every corner of the state. *Id.* at 4.

336. SENATE BILL 105 INTERIM REPORT, *supra* note 21, at 6.

337. *Id.*

338. Amended Defendants' Response to April 11, 2013 Order Requiring List of Proposed Population Reduction Measures, *supra* note 209, at 8 (emphasis added).

reforms like these would be more appropriately enacted via the legislative process than imposed by federal judicial fiat. But the federal courts have been forced to step in to address the State's overcrowded prisons precisely because the political process has repeatedly failed.

In their January 2013 pleadings in the *Plata* litigation, the State asserted that further reductions in the prison population necessary to meet the court-imposed cap were impossible without amending the state constitution or changing state law.³³⁹ They further argued that no additional reductions were possible without significantly threatening public safety:

The further prison population reductions that would be needed to satisfy the Court's population cap cannot be achieved unless the Court alters state law, dictates the adoption of risky prison policies, and orders the early release of inmates serving prison terms for serious and violent felonies. The Court itself would need to take these actions because Defendants are barred from adopting new population-reduction measures by state law and the state constitution. Some of these prohibitions can only be changed by a supermajority of the Legislature or by voter initiative.³⁴⁰

Similarly, Governor Brown has stated in press interviews that he "wants to respect the law of California, what the people have enacted or the Legislature."³⁴¹ These assertions, though, cloak policy decisions in the false mantle of constitutional and statutory imperative. It is true that reforms like those proposed in this Article to change some wobblers and non-serious, non-violent felonies to misdemeanors would require changing existing statutes. And, as noted previously, directly extending reforms like those accomplished by Proposition 36's amendment of the Three Strikes laws to second-strikers as well would indeed require a constitutional amendment.

Yet it is also true that Realignment itself required hundreds of amendments to the California Penal Code, and another ballot initiative authored, financed, and championed by the Brown administration (Proposition 30, enacted by voters in the November 2012 election) was required to provide constitutionally-protected funding.³⁴² Sentencing

339. *Id.*

340. *Id.*

341. *California Challenges Federal Oversight of Prisons*, KQED, *supra* note 207.

342. See *Text of Proposed Laws: Proposition 30*, at sec. 3(d), CAL. SEC'Y OF STATE, available at <http://vig.cdn.sos.ca.gov/2012/general/pdf/text-proposed-laws-v2.pdf#nameddest=prop30> ("This measure gives constitutional protection to the shift of local public safety programs from state to local control and the shift of state revenues to local government to pay for those programs."); CAL. CONST. art. XIII, §§ 36(b)–(c) (Section

reform would also be possible if the political leadership in Sacramento pushed as hard in the Legislature and with the public as they did to enact and fund Realignment. The choice not to do so is just that: a political choice, not an externally imposed mandate. As we demonstrate in the next Section, all too often in Sacramento such political choices are dictated by powerful law enforcement interests perennially opposed to sentencing reform.

1. *Tales from the Legislative Trenches: Two Modest Sentencing Reform Proposals Defeated by Law Enforcement*

a. *SB 1506 To Reduce the Penalty for Personal Possession of Small Amounts of Controlled Substances*

In the 2011–2012 legislative session, Senator Mark Leno (D-San Francisco) introduced Senate Bill 1506, which proposed to add California to the list of thirteen states,³⁴³ the District of Columbia, and the federal government currently treating possession of drugs for personal use as a misdemeanor rather than a felony or a wobbler.³⁴⁴ Longer sentences have never been demonstrated to effectively deter or limit drug abuse.³⁴⁵ Instead, research conducted by the Justice Policy Institute shows that states, and the District of Columbia, charging drug possession as a misdemeanor have higher rates of treatment admissions and slightly lower rates of illicit drug use than states charging it as a felony.³⁴⁶ This bill would have saved state and county governments a

36 was added on November 6, 2012 by initiative proposition 30).; Marisa Lagos and Wyatt Buchanan, *Much More Rides on Prop. 30 than Schools*, SF CHRON. (Nov. 3, 2012), available at <http://www.sfgate.com/news/article/Much-more-rides-on-Prop-30-than-schools-4006526.php>; Kevin Yamamura, *Funding Fight On if Prop. 30 Fails*, SACRAMENTO BEE (Oct. 23, 2012), available at <http://www.sacbee.com/2012/10/23/4930852/funding-fight-on-if-prop-30-fails.html>.

343. Delaware, Iowa, Maine, Massachusetts, Mississippi, New York, Pennsylvania, South Carolina, Tennessee, Vermont, West Virginia, Wisconsin, and Wyoming. See DEL. CODE ANN. tit. 16, § 4763 (West 2014); IOWA CODE ANN. § 124.401(5) (West 2014); ME. REV. STAT. tit. 17-A, §§ 1107-A (C-F), 1252 (West 2014); MASS. GEN. LAWS ANN. ch. 94C, § 34 (West 2014); MISS. CODE ANN. § 41-29-139(c) (West 2014); N.Y. PENAL LAW § 220.03 (McKinney 2014); 35 PA. STAT. ANN. §§ 780-113(a)(1), (b) (West 2014); S.C. CODE ANN. § 44-53-370(c) (West 2014); TENN. CODE ANN. §§ 39-17-418(a), (c) (West 2014); VT. STAT. ANN. tit. 18, §§ 4231-4235a (West 2014); W. VA. CODE ANN. § 60A-4-401(c) (West 2014); WIS. STAT. ANN. § 961.41(3g) (West 2014); WYO. STAT. ANN. § 35-7-1031(c)(1) (West 2014).

344. See D.C. CODE § 48-904.01(d)(1) (West 2014); 21 U.S.C.A. § 844 (West 2014).

345. See JUSTICE POLICY INST., SUBSTANCE ABUSE TREATMENT AND PUBLIC SAFETY 7 (Jan. 2008), available at http://www.justicepolicy.org/images/upload/08_01_REP_DrugTx_AC-PS.pdf.

346. *Id.* at 2. Unlike California where the punishment for possession of drugs, other than

billion dollars over five years³⁴⁷ and allowed communities to preserve jail space for people who pose a risk to public safety.³⁴⁸ The Legislative Analyst's Office estimated that SB 1506 would have resulted in "an annual savings of nearly \$160 million for counties and just over \$64 million for the state."³⁴⁹ It also would have reduced "the average daily state prison population by about 2,200 people and the average daily county jails population by 2,000 people."³⁵⁰ Finally, SB 1506 would have reduced recidivism by eliminating the lifetime barriers to employment, housing, and education that accompany felony convictions.³⁵¹

marijuana, is typically a felony, 13 states, the District of Columbia, and the federal government treat all drug possession as a misdemeanor. *See* C.R.S. §§ 18-18-404, 18-18-403.5, 18-1.3-501, 18-1.3-401, An Act Concerning Reduction of Sentences for Particular Drug Crimes, and, in connection therewith, Creating a Drug Offender Treatment Fund, S.B. 03-318, Session Laws of 2003, First Regular Session of the 64th General Assembly, ch. 424 § 1; DEL. CODE tit. 11, § 4206, DEL. CODE tit. 16, §§ 4763, 4767, An Act to Amend Titles 10, 11, 16 and 21 of the Delaware Code Relating to Drug-Involved Offenses, H.B. 19, Second Regular Session of the 146th General Assembly ch. 13 (2011); IOWA CODE §§ 124.401(5), 903.1; 17-A M.R.S. §§ 1101, 1103, 1107-A, 1252; MASS. GEN. LAWS ch. 94c § 34, MASS. GEN. LAWS ch. 274 § 1; MISS. CODE § 41-29-139(c)(1); N.Y. PENAL CODE §§ 70.70, 220.03, 220.06, 220.09; 35 PA. STAT. § 780-113(a)(1), (b); S.C. CODE §§ 44-53-370(c), (d); TENN. CODE ANN. §§ 39-17-418, 39-17-419, 40-35-11; VT. STAT. ANN. tit. 18, §§ 4231, 4233; VT. STAT. ANN. tit. 13, § 1; W. VA. CODE §§ 60A-4-401(c), 60A-4-407, 60A-4-408; WIS. STAT. § 961.41(3g); WYO. STAT. §§ 35-7-1030, 35-7-1031, 35-7-1032, 35-7-1033, 35-7-1038; MD. CODE, CRIM. LAW §§ 5-601(c), 5-614(a); N.C.G.S. § 90-95(d), 15A-1340.17, O.R.C. §§ 2925.11(C), 2925.01(D), 2929.14(A)(5); V.T.C. HEALTH & SAFETY CODE §§ 481.115, 481.102, V.T.C. PENAL CODE § 12.35; D.C. CODE § 48-904.01(d)(1), (e); 21 U.S.C. §§ 844(a), 841, 18 U.S.C. § 3607. Moreover, drug crime is not higher in those states. *See* SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN., STATE REPORTS ON ALCOHOL, TOBACCO, AND ILLEGAL DRUG USE (2007), available at <http://oas.samhsa.gov/statesList.cfm>.

347. *See* Letter from Mac Taylor, Legislative Analyst, to Mark Leno, California State Sen. (Feb. 28, 2012) (on file with the office of Sen. Leno); *see also* *Leno Bill Revises Penalty for Simple Drug Possession*, CAL. STATE SEN. MARK LENO (Feb. 27, 2012), <http://sd11.senate.ca.gov/news/2012-02-27-leno-bill-revises-penalty-simple-drug-possession> [hereinafter *Leno Bill*].

348. S.B. 1506, 2011–2012 Leg., Reg. Sess. (Cal. 2012).

349. *See* Wyatt Buchanan, *Calif. Bill would ease drug possession penalties*, SF GATE (Apr. 18, 2012), <http://www.sfgate.com/news/article/Calif-bill-would-ease-drug-possession-penalties-3490103.php#ixzz2KbheUqXn>; *see also* *Leno Bill*, *supra* note 347 ("The Legislative Analyst's Office estimates reducing penalties for drug possession will save counties about \$159 million annually, in addition to yearly savings for the State totaling \$64.4 million.").

350. *Id.*

351. *See* CHRISTY VISHER, SARA DEBUS & JENNIFER YAHNER, JUSTICE POLICY CTR., EMPLOYMENT AFTER PRISON: A LONGITUDINAL STUDY OF RELEASES IN THREE STATES, (Oct. 2008), available at http://www.urban.org/UploadedPDF/411778_employment_after_prison.pdf (study indicating that inmates who were employed and earning higher wages after release were less

b. *SB 210: Reforming Pre-Trial Detention Practices to Allow More Individuals Charged with Non-Violent, Non-Serious Offenses to Be Released From Jail While Awaiting Their Day in Court*

SB 210, introduced in the 2011–2012 legislative session by Senator Loni Hancock (D-Oakland), would have provided a framework whereby pretrial detainees, whom the court determines present a minimal risk to public safety, could be released to community supervision while they await trial—instead of taking up jail space because they cannot afford bail.³⁵² As discussed above, the vast majority of people in county jails statewide on any given day are being held pretrial.³⁵³ A significant portion of these individuals remain in jail awaiting their day in court, not because they present a risk to public safety, but because they cannot afford to pay bail.³⁵⁴ Notably, Latino and black defendants are more likely than white defendants to be held in jail because of an inability to post bail.³⁵⁵ SB 210 would have simply required judges to consider whether defendants were appropriate for community monitoring even if they could not afford bail.³⁵⁶ Jurisdictions across the country—including some counties in California—have implemented similar reforms and, as a result, have been able to avoid or reduce jail overcrowding while protecting public safety and saving tax dollars.³⁵⁷

2. *Thwarting Reform: The Law Enforcement Lobby*

Opposition from the District Attorneys', Sheriffs', and Police Chiefs' Associations defeated these bills.³⁵⁸ Sen. Leno reintroduced a

likely to return to prison the first year out); *see also* CROSSROADS, *supra* note 138, app. C (explaining how research has demonstrated that employment is a key factor in reducing recidivism).

352. S.B. 210, 2011–2012 Leg., Reg. Sess. (Cal. 2012).

353. Sixty-two percent of people in California jails are unsentenced. *See* JPS, *supra* note 112.

354. *Id.*

355. Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873, 877 (2003).

356. S.B. 210, 2011–2012 Leg., Reg. Sess. (Cal. 2012).

357. *Id.*

358. *See, e.g., Senate Committee on Public Safety Bill Analysis for S.B. 1506*, 2011–2012 Reg. Sess. (Apr. 16, 2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1501-1550/sb_1506_cfa_20120416_121628_sen_comm.html; *Assembly Committee on Public Safety Bill Analysis for S.B. 210*, 2011–2012 Reg. Sess. (July 2, 2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0201-

compromise version of SB 1506 in the 2013–2014 legislative session. The new bill, SB 649, would have reduced the felony drug possession offenses in the original bill to wobblers, rather than misdemeanors as proposed in SB 1506.³⁵⁹ The compromise version was again opposed by the District Attorneys', Sheriffs', and Police Chiefs' Associations.³⁶⁰ This time, despite this opposition, SB 649 was approved by the Senate and the Assembly and sent to Governor Brown for his signature. The Governor, however, vetoed the bill.³⁶¹

Other commentators have thoroughly documented the ways in which this powerful law enforcement lobby has aggressively fought virtually any proposal to reform state sentencing laws over the past forty years.³⁶² Throughout the country, law enforcement special interests and politicians have manipulated the public's fear of crime to justify ever-harsher punishment, longer sentences, and more prisons and jails.³⁶³ California illustrates this dynamic perhaps better than any

0250/sb_210_cfa_20120702_100001_asm_comm.html (not surprisingly, SB 210, the pretrial release reform bill, was also opposed by the private bail bond industry); *Senate Committee on Public Safety Bill Analysis for S.B. 649*, 2012–2013 Reg. Sess. (Apr. 17, 2013), available at http://leginfo.ca.gov/pub/13-14/bill/sen/sb_0601-0650/sb_649_cfa_20130422_095056_sen_comm.html.

359. See S.B. 1506, 2011–2012 Leg., Reg. Sess. (Cal. 2012).

360. See *Senate Committee on Public Safety Bill Analysis for S.B. 649*, *supra* note 327; *Assembly Committee on Public Safety Bill Analysis for S.B. 649*, 2013–2014 Reg. Sess. (June 12, 2013), available at http://leginfo.ca.gov/pub/13-14/bill/sen/sb_0601-0650/sb_649_cfa_20130612_155938_asm_comm.html.

361. *Veto Message for S.B. 649*, 2012–2013 Reg. Sess. (Oct. 12, 2013), available at http://leginfo.ca.gov/pub/13-14/bill/sen/sb_0601-0650/sb_649_vt_20131012.html.

362. See, e.g., JOSHUA PAGE, *THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA* 6 (2011) (describing the history of the California prison guards' union (CCPOA) and the ways in which their political influence grew markedly with prison expansion, making them a powerful force in California politics able to repeatedly defeat attempts to reform state sentencing laws); FRANKLIN E. ZIMRING ET AL., *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA* 3–16 (2001) (describing law enforcement lobby's role in defeating numerous attempts to revise the most draconian elements of the state's "Three Strikes" law shows); Michael C. Campbell, *Politics, Prisons, and Law Enforcement: An Examination of the Emergence of "Law and Order" Politics in Texas*, 45 *LAW & SOC'Y REV.* 631, 661–62 (2011) (describing how groups affiliated with law enforcement have emerged as some of the most active opponents of recent efforts by California to reduce overcrowding by releasing qualified inmates early).

363. See, e.g., BARKER, *supra* note 59, at 81–83 (The author describes how Crime Victims United of California (CVUC), a political action committee made up of crime victims groups, law enforcement organizations, and high-profile state officials such as the governor and attorney general led a successful campaign against Proposition 66, a 2004 ballot initiative seeking to reform the state's harsh Three Strikes law, "based on fear and loathing. They tapped into the public's fear of random violence, its sense of victimization and insecurity about crime, moral outrage about child molesters and sex offenders. . . ."); see

other state. As one former state Senator stated in June 2011, “There’s a political paralysis here—people are afraid . . . of being labeled soft on crime, so they legislate by sound bite.”³⁶⁴ Michael Jacobson, the Executive Director of the Vera Institute of Justice,³⁶⁵ explained in 2008:

Meaningful prison reform has eluded the state for decades, already resulting in a federal takeover of the state prison’s medical system and a pending federal takeover of the rest of the system. Why the California correctional system has grown so fast and become so overcrowded and violent is the subject for another article. Suffice it to say that because the politics of crime in California are so difficult and involve so many powerful interest groups, including the state’s district attorneys, the California Correctional Peace Officers Association, victims’ rights groups, and police chiefs, along with a wide political split between Democratic and Republican legislators on matters of crime policy, achieving consensus on reform proposals has proven impossible. Add in all the public referenda toughening sentences over the last few years, and you end up with a toxic political mix, which has to date prevented any serious reform of this behemoth system.³⁶⁶

Similarly, the Center for Juvenile and Criminal Justice explained in a 2011 report on the influence of the law enforcement lobby on California incarceration rates:

Both driving the decades long changes in incarceration rates and severity of the sentences handed out, and also seeking to take advantage of them, is a network of special interest groups, professional associations, and Sacramento-based lobbyists. Groups such as the California Correctional Peace Officers’ Association (CCPOA); the Police Chiefs Association; the Sheriffs Association; the District Attorneys Association (CDAA); Crime Victims United

also SIMON, JONATHAN, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 75–110 (2007); Campbell, *supra* note 362, at 632. (“Law enforcement groups enjoy a privileged degree of public legitimacy, and, as the successful defeat of California’s attempts to revise the most draconian elements of the state’s “Three Strikes” law shows, are often unwilling to compromise on policies widely regarded as ineffective in dealing with crime.”).

364. Marisa Lagos, *Political Will for Reform is Lacking: California Lags Behind in Reducing Incarceration*, SF CHRON, June 13, 2011, at 1a.

365. The Vera Institute is an independent, nonpartisan, nonprofit center for justice policy and practice, with offices in New York City, Washington, DC, and New Orleans. Vera’s projects and reform initiatives, typically conducted in partnership with local, state, or national officials, are located across the United States and around the world.

366. Michael Jacobson, *Crisis and Opportunity in California’s Prison System*, 13 BERKELEY J. CRIM. L. 319, 320 (2008).

(CVU); and the Peace Officers Research Association of California (PORAC)—which puts out policy papers and other materials advocating for particular criminal justice changes—have spent millions of dollars over the years influencing elections, lobbying for and against specific policies, and, endorsing and donating to candidates who offer them favorable employment contracts and the chance to expand their membership roles.³⁶⁷

While on the one hand, many county officials have decried the additional burdens Realignment places upon local criminal justice systems, elected Sheriffs, District Attorneys, and Police Chiefs from those same counties have, through their lobbyists in Sacramento, opposed the very reforms necessary to make Realignment work better and to reduce the pressures on local jails.³⁶⁸

The statewide law enforcement associations are likely to continue to oppose sentencing reforms like those proposed in this Article. Indeed, without the external countervailing pressure on the State from the *Plata* litigation, it is unlikely that Realignment would ever have been enacted in the first place.

C. Public Support for Reform

Recent public opinion polls demonstrate that Californians across the state and across the political spectrum overwhelmingly support smart-on-crime policies, including alternatives to incarceration for many low-level offenses, and especially for people who are awaiting trial and who pose little risk to public safety.³⁶⁹ Nationally, nearly two-thirds of Americans, across almost all demographic groups, support moving away from mandatory prison terms for non-violent drug crimes.³⁷⁰ California voters also strongly support the specific reforms

367. ABRAMSKY, *supra* note 46.

368. See, e.g., S.B. 210, 2011–2012 Leg., Reg. Sess. (Cal. 2012); *Senate Committee on Public Safety Bill Analysis for S.B. 1506*, 2011–2012 Reg. Sess. (Apr. 16, 2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1501-1550/sb_1506_cfa_20120416_121628_sen_comm.html (demonstrating that District Attorneys, Police, and Sheriffs associations were opposed to the bill); *Assembly Committee on Public Safety Bill Analysis for S.B. 210*, 2011–2012 Reg. Sess. (July 2, 2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0201-0250/sb_210_cfa_20120702_100001_asm_comm.html (demonstrating that District Attorneys, Police, and Sheriffs associations were opposed to the bill).

369. See AM. CIVIL LIBERTIES UNION, REALIGNMENT ONE-YEAR ANNIVERSARY: AN AMERICAN CIVIL LIBERTIES UNION ASSESSMENT (Sept. 27, 2012), available at https://www.aclunc.org/issues/criminal_justice/asset_upload_file861_10684.pdf [hereinafter REALIGNMENT ONE-YEAR ANNIVERSARY].

370. Carroll Doherty, Juliana Menasce Horowitz & Rob Suls, PEW RESEARCH CTR., *America's New Drug Policy Landscape, Two-Thirds Favor Treatment, Not Jail, for Use of*

that died in the Legislature during the 2011–2012 and 2012–2013 sessions. According to data from Tulchin Research surveys conducted in May and September 2012, 7 out of 10 likely voters favor allowing courts to require monitoring in the community instead of jail for those who cannot afford to post bail.³⁷¹ Another seventy percent support reducing the penalty for simple possession of a small amount of drugs for personal use.³⁷²

Californians are entirely more concerned with the state's poor economic condition, lack of jobs, the state budget, and cuts to education than with crime and related issues. Barely 1 percent ranked crime, drugs, gangs, and violence combined as the state's most serious problem.³⁷³ Nearly 4 out of 5 voters (78 percent) believe that our prisons and jails are overcrowded and we should look for alternatives, while only 15 percent disagree.³⁷⁴ When given a choice as to how to spend law enforcement dollars, voters overwhelmingly prefer investing in "more prevention and alternatives to jail for non-violent offenders" than building "more prisons and jails" (75 percent compared with only 12 percent).³⁷⁵

Additionally, as noted above, California voters demonstrated, for the first time in decades, widespread popular support for scaling back some of the state's harsh sentencing laws when they overwhelmingly passed Proposition 36, revising the state's 1994 Three Strikes scheme.³⁷⁶ Perhaps more remarkable than the overall margin of victory for Prop. 36 (69.3 percent to 30.7 percent) is the fact that it garnered a majority of votes in each of the state's 58 counties; in most counties, the "yes" vote was close to or more than 60 percent.³⁷⁷

When voters demonstrate such strong support for evidence-based public policy, elected officials must follow or be held accountable.³⁷⁸

Heroin, Cocaine at 7–8 (Apr. 2, 2014), <http://www.people-press.org/files/legacy-pdf/04-02-14%20Drug%20Policy%20Release.pdf> [hereinafter *America's New Drug Policy Landscape*].

371. REALIGNMENT ONE-YEAR ANNIVERSARY, *supra* note 369.

372. *Id.*; *America's New Drug Policy Landscape*, *supra* note 370, at 7–8.

373. See REALIGNMENT ONE-YEAR ANNIVERSARY, *supra* note 369.

374. *Id.*

375. *Id.*

376. See Prop. 36, *supra* note 67.

377. See CAL. SEC'Y OF STATE, STATEMENT OF VOTE NOVEMBER 6, 2012, GENERAL ELECTION 68–69 (2012), available at <http://www.sos.ca.gov/elections/sov/2012-general/sov-complete.pdf>.

378. *It's Time to Revise Penalties for Simple Drug Possession*, ACLU OF N. CAL., available at https://www.aclunc.org/issues/criminal_justice/it's_time_to_revise_penalties_for_simple_drug_possession.shtml.

CONCLUSION

Much of this Article has focused upon Realignment in the context of the State's attempts to comply with the population cap set by *Plata*. But even if the State can achieve the three-judge courts' 137.5 percent population target through some combination of Realignment, SB 105, additional funding to further expand prison capacity, and prisoner release orders from the three-judge court's Compliance Monitor, California prisons will still be overflowing. It is important to remember that the three-judge court set the 137.5 percent cap pursuant to the PLRA, which requires significant federal deference to states' decisions about running their prison systems.³⁷⁹ The court-ordered reduction may well not be sufficient to end constitutionally prohibited cruel and unusual punishment.³⁸⁰ Even assuming that compliance with the *Plata*

379. See *Plata*, 131 S. Ct. at 1945 (noting the "strong evidence" that a population limit of 130% might be necessary to remedy the constitutional violations, while also acknowledging the three-judge court's finding that some upward adjustment from 130% was warranted in light of "the caution and restraint required by the PLRA.").

380. *Id.*; see also *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 960-963 (E.D. Cal. 2009) ("Finding that plaintiffs' request for a cap of 130% was "reasonable and finds considerable support in the record," but also that there was "some evidence that a reduction in the population to a level somewhat higher than 130% of the system's design capacity ... might provide the relief from overcrowding necessary for the state to correct the constitutional violations at issue." (Emphasis added). In fact, California prisons remain severely overcrowded, second only to Alabama's. See Expert Declaration of Craig Haney at 12, 15, *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 1004 (E.D. Cal. 2013) (No. 90-0520). Specific prisons within the state continue to operate at extremely crowded levels—some at over 170 percent of design capacity. See *id.*; CDCR, WEEKLY INSTITUTION/CAMPS POPULATION DETAIL at 2 (May 7, 2014), available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Weekly_Wed/TPOP1A/TPOP1Ad140507.pdf. Moreover, even as the state prison system has dropped over the course of the *Plata* litigation from nearly 190% of design capacity to current levels, "there has been essentially no reduction in the overall mentally ill prisoner population." Expert Declaration of Craig Haney at 15, *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 1004 (E.D. Cal. 2013) (No. 90-0520); see also Declaration of Michael W. Bien in Support of Plaintiffs' Response to Defendants' Amended Application and [Proposed] Order at 2, *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 1004 (E.D. Cal. 2014) (No. 90-0520) ("Reductions to date in CDCR's prison population have failed to benefit the *Coleman* class."). Prisoners are still suffering the symptoms and effects of crowding, including: shortages of clinicians and custody officers; shortages of treatment space, recreation space and specialized medical and mental health beds; and delays in access to care. See Expert Declaration of Craig Haney at 14-17, *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 1004 (E.D. Cal. 2013) (No. 90-0520); Declaration of Michael W. Bien in Support of Plaintiffs' Response to Defendants' Amended Application and [Proposed] Order at 1, *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 1004 (E.D. Cal. 2014) (No. 90-0520). In addition, if, as currently planned, the State chooses to build or rent its way into compliance with the 137.5 percent cap, it will end up with even more severe shortages of clinicians. See *Plata*, 131 S. Ct. at 1939 (finding that overcrowding does not just mean a shortage of beds, but a lack of

order will remedy the constitutional violations, this is a low bar. California will still have tens of thousands more incarcerated than the state's prisons were designed to house. The standards for sound criminal justice policy, effective corrections management, and basic good government should be higher than simply meeting the bare minimum required by the constitution. Complying with *Plata* ought to be the beginning, not the end, of the conversation about reforming the state's criminal justice policies.

The public opinion research discussed above demonstrates that among California voters, the politics of fear are giving way to new demands for fiscal responsibility and effective government. Californians want their elected representatives to be smart on crime and are increasingly disenchanted with the billions spent each year incarcerating those who commit low-level, non-violent crimes at the expense of public health, college tuition, primary education, and the overall economic health of the state. Voters, when asked which candidate they would support for the legislature—a candidate who supports pretrial release versus a candidate who opposes pretrial release—prefer by a nearly 3-to-1 margin a candidate who supports this reform (63 percent to 23 percent).³⁸¹ In addition, over half of all likely voters would be more likely to vote for a state representative who supported revising the penalty for simple possession of drugs from a felony to a misdemeanor.³⁸²

Legislators who continue to cater to the law enforcement lobby risk more than just reelection. The state's fiscal wellbeing and community safety are at stake. The overly punitive sentencing laws and prison expansion over the past decades are precisely what created the current constitutional and fiscal incarceration crisis and led California to its alarming recidivism rate.³⁸³

The *Plata* litigation and Realignment have ignited the most significant criminal justice policy debate in California in decades. But

resources necessary to address the fundamental needs of prisoners); *Coleman*, 922 F. Supp. 2d at 954-55 (holding that merely adding beds will not address the principal effects of overcrowding).

381. REALIGNMENT ONE-YEAR ANNIVERSARY, *supra* note 369.

382. *Id.*

383. *See supra* Section III.B. Higher rates of incarceration and longer sentences do little, if anything, to reduce crime. *See supra* note 70. Indeed, imprisonment has a “criminogenic”—crime producing—effect, and the more time served the more likely one is to offend again. Craig Haney, *Prison Effects of in the Age of Mass Incarceration*, THE PRISON J. 15 (Jan. 25, 2012), available at <http://tpj.sagepub.com/content/early/2012/09/11/0032885512448604>.

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thus far the practical impact has fallen fall short of the paradigm shift some predicted. Paradigm shifts never come without considerable disruption and often are hard-fought. Whether future historians will decide Realignment marked such a turning point in California criminal justice policies depends upon whether the state's political leaders are willing to reform the harsh sentencing laws that caused the prison overcrowding in the§ first place.