

# *Coleman/Plata*: Highlighting the Need to Establish an Independent Corrections Commission in California

## INTRODUCTION

On August 4, 2009, a three-judge federal court found that overcrowding in California prisons led to violations of inmates' constitutional rights and ordered the Governor of California and various state officials ("defendants" or "the state") to develop a plan to reduce the state prison population by 46,000 inmates,<sup>1</sup> or approximately twenty-five percent of the total prison population.<sup>2</sup> However, the *Coleman/Plata* court order will not provide long-term relief from the overcrowding crisis and its resulting constitutional violations. Instead, it is likely that California will return to the same position a few years from now, given the state's historically tough-on-crime politics and resistance to reforms that would effectively manage sentencing, rehabilitation, and parole issues. The state's best course of action to prevent such an outcome is to (1) create an independent corrections commission, (2) improve and expand community-based punishments and rehabilitation programs, and (3) reform the parole system.

Part I of this paper provides background on California's prison crisis by exploring the California state prison system, the Prison Litigation Reform Act ("PLRA"), and the *Coleman/Plata* case. Part II describes the barriers to achieving a long-term solution to the prison crisis in California. It also recommends that the state establish an independent commission with the necessary authority to promulgate policies to resolve the prison crisis.

## I. BACKGROUND

The discussion below will provide background information necessary to identify possible barriers to improving the prison system and recommend a long-term solution to the prison crisis. Following an overview of the current

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1. *Coleman v. Schwarzenegger*, No. S90-0520, No. C01-1351, 2009 U.S. Dist. LEXIS 67943, \*364, 394-95 (E.D. Cal. Aug. 4, 2009).

2. Appellants' Application for Stay Pending Final Disposition at 1, *Schwarzenegger v. Plata*, No. C01-1351 (E.D. Cal. Sept. 4, 2009); *Schwarzenegger v. Coleman*, No. S90-0520 (N.D. Cal. Sept. 4, 2009).

crisis in California prisons and some of its causes, this section describes the PLRA, which created standards for obtaining relief in prison conditions lawsuits, such as prisoner release orders. Finally, this section discusses how the *Coleman/Plata* litigation has utilized the PLRA to force California to remedy its prison crisis.

### 1. Overview of California State Prisons

“California’s prisons are out of space and running out of time,” according to a 2007 study by the Little Hoover Commission.<sup>3</sup> The prison population in California has increased by 750 percent since the mid-1970s,<sup>4</sup> reaching an all-time high of 173,479 inmates in October 2006.<sup>5</sup> The state’s parolee population reached an all-time high of 128,108 parolees in August 2007.<sup>6</sup> Furthermore, California has a seventy percent recidivism rate, one of the highest in the nation.<sup>7</sup> Most of the recidivism rate is due to parole violations, many of which are merely technical.<sup>8</sup>

In October 2006, California Governor Arnold Schwarzenegger declared a prison overcrowding state of emergency.<sup>9</sup> Noting that all of the state’s prisons were full, the Governor warned that twenty-nine out of thirty-three prisons were so overcrowded that they “pose[d] substantial safety risks” to the health and safety of prison workers and inmates.<sup>10</sup> Inmates in overcrowded prisons must sleep in classrooms, gymnasiums and hallways,<sup>11</sup> creating security risks because tight quarters and double bunks block correctional officers’ views of inmates.<sup>12</sup> Such overcrowding also leads to increased risk of infectious illnesses<sup>13</sup> and environmental contamination from overloading prison sewage

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3. LITTLE HOOVER COMMISSION, SOLVING CALIFORNIA’S CORRECTIONS CRISIS: TIME IS RUNNING OUT (2007) [hereinafter TIME IS RUNNING OUT].

4. *Coleman*, 2009 U.S. Dist. LEXIS 67943, at \*101-02 (citations omitted).

5. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, CORRECTIONS: MOVING FORWARD 4 (2009) [hereinafter MOVING FORWARD].

6. *Id.* The prison population has been reduced to 166,569 by August 2009, and the parolee population has been reduced to 111,308 parolees by August 2009. *Id.*

7. TIME IS RUNNING OUT, *supra* note 3, at 2.

8. *Id.* at ii.

9. Cal. Proclamation No. 4278 (Oct. 4, 2006), available at <http://gov.ca.gov/proclamation/4278>.

10. *Id.*

11. TIME IS RUNNING OUT, *supra* note 3, at i, 2; MOVING FORWARD, *supra* note 5, at 4 (These non-traditional bed arrangements are referred to as “bad beds.” In August 2009, the state prison system bad bed level reached its lowest point since the 1990s when the system’s bad beds totaled to 10,568.)

12. Cal. Proclamation No. 4278. See Will Bigham and Neil Nisperos, *Riot at Chino’s Men Prison Came Amid Overcrowding and Deficiencies*, OAKLAND TRIBUNE, Aug. 15, 2009, available at [http://www.insidebayarea.com/california/ci\\_13119742](http://www.insidebayarea.com/california/ci_13119742) (last visited Feb. 11, 2009).

13. Cal. Proclamation No. 4278; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION EXPERT PANEL ON ADULT OFFENDER REENTRY AND RECIDIVISM REDUCTION PROGRAMS, REPORT TO THE CALIFORNIA STATE LEGISLATURE: A ROADMAP FOR EFFECTIVE OFFENDER PROGRAMMING IN CALIFORNIA 9 (2007), available at

systems.<sup>14</sup>

California's prisons have reached a "breaking point" due to the state's tough-on-crime policies, which lack the funding necessary to support the growing prison population.<sup>15</sup> The state's passage of harsh mandatory sentencing and three strikes laws, shift to determinate sentencing,<sup>16</sup> and acceptance of a "counterproductive" parole system have caused dramatic growth in the prison population.<sup>17</sup> Specifically, the proliferation of sentencing bills supported by the public, the Legislature, and criminal justice officials led to increases in mandatory sentences for particular crimes.<sup>18</sup> In addition, the passage of the Determinate Sentencing Law of 1977 lengthened sentences for certain crimes, which, especially when combined with other prison policies, eliminated incentives for inmates to rehabilitate.<sup>19</sup> Prior to the passage of the Determinate Sentencing Act, parole was a reward given to inmates who served their minimum sentences, changed their behavior, and arranged for employment and housing.<sup>20</sup> Such discretionary parole was eliminated with the passage of determinate sentencing, leading to the release of the majority of inmates from prison at the end of their term, regardless of their rehabilitation or

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[http://www.cdcr.ca.gov/News/docs/Expert\\_Rpt/ExpertPanelRpt\\_Part1.pdf](http://www.cdcr.ca.gov/News/docs/Expert_Rpt/ExpertPanelRpt_Part1.pdf) (last visited on Feb. 16, 2010) [hereinafter CDCR EXPERT PANEL] (stating that "according to documents provided . . . by CDCR Chief Deputy Secretary Scott Kernan (2007), 'housing inmates in non-traditional quarters presents serious safety concerns for both inmates and correctional staff. The overcrowding of CDCR facilities has led to increased numbers [of] infectious disease outbreaks . . . .'").

14. Cal. Proclamation No. 4278; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, FINAL STATEMENT OF REASONS FOR INMATE TRANSFERS 1-2 (2009), available at [http://www.cdcr.ca.gov/Regulations/Adult\\_Operations/docs/NCDR/2008NCR/08\\_05\\_FSOR%20COCF.pdf](http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/NCDR/2008NCR/08_05_FSOR%20COCF.pdf) (last visited Feb. 17, 2010) (stating that overcrowded prisons have caused prison sewage systems to operate at maximum capacity and that "[o]verloading the prison sewage and water systems has resulted in increased damage to state and private property which have resulted in multiple fines, penalties and/or notices of violations to the CDCR related wastewater/sewer system overloading groundwater contamination and environmental pollution"). See Tamara Keith, *The Problem of Prison Waste*, NPR.ORG, Jan. 16, 2007, <http://www.npr.org/templates/story/story.php?storyId=6869359> (last visited Feb. 17, 2010) (reporting that the California prison in Mule Creek is so overcrowded that untreated waste water and solids have been released from its plant and accidentally spilled into the creek running through the prison grounds, while CDCR Environment Attorney Chris Swanberg indicated that pollution waste water issues are because the prisons have "too many inmates and not enough infrastructure to handle it").

15. *Coleman v. Schwarzenegger*, 2009 U.S. Dist. LEXIS 67943, at \*393, 394.

16. In a determinate sentencing system, the court specifies a fixed term of incarceration and parole decisions are not discretionary, whereas in an indeterminate sentencing system, the court may set upper and lower limits on incarceration terms and the actual date of release is determined later by a parole authority. THE BLUE RIBBON COMMISSION ON INMATE POPULATION MANAGEMENT, FINAL REPORT 94 (1990) [hereinafter BLUE RIBBON COMMISSION].

17. *Coleman*, 2009 U.S. Dist. LEXIS 67943, at \*392-93. See BLUE RIBBON COMMISSION, *supra* note 16, at 24 (stating that parole violations are a "significant and dramatically increasing contributing factor to prison population increases.").

18. BLUE RIBBON COMMISSION, *supra* note 16, at 27.

19. *Id.* See CDCR EXPERT PANEL, *supra* note 13, at 51.

20. TIME IS RUNNING OUT, *supra* note 3, at 22.

readiness to be released into the community.<sup>21</sup>

Despite the Governor's call for reform and nearly two decades of studies by the Blue Ribbon Commission of Population Management, the Little Hoover Commission, and the Corrections Independent Review Panel, California policy-makers have been unwilling or unable to make the necessary reforms to resolve California's prison crisis.<sup>22</sup> In January 2006, the Legislature rejected Governor Schwarzenegger's proposal that six billion dollars in the Strategic Growth Plan be used to increase the number of local jail beds and to build two new prisons with space for 83,000 prisoners.<sup>23</sup> On June 26, 2006, Governor Schwarzenegger called the Legislature into a special session and the California Department of Corrections and Rehabilitation ("CDCR") submitted recommendations to address both short and long-term issues in the overcrowding crisis.<sup>24</sup> Still, the Legislature failed to pass legislation addressing the issue.<sup>25</sup>

The Executive, acting alone, has been unable to completely address the overcrowding issue. On October 4, 2006, Governor Arnold Schwarzenegger declared a state of emergency due to overcrowding, which remains in effect today.<sup>26</sup> Pursuant to the declaration, the Governor transferred California inmates to out-of-state facilities and suspended state contracting laws so the CDCR could obtain the goods and services it needed to mitigate the overcrowding issues.<sup>27</sup> But these measures were not enough to solve the overcrowding problem, as demonstrated by the *Coleman/Plata* prisoner release order.

The Governor and Legislature had some previous success in addressing the overcrowding issue. In May 2007, Assembly Bill 900 ("AB 900") was signed into law.<sup>28</sup> AB 900 allocated \$1.2 billion to construct new prisons, provided funding for more beds in rehabilitation centers and in current prisons, and permitted the continued transfer of inmates to out-of-state facilities.<sup>29</sup>

Despite the successful passage of AB 900, the government has been reluctant to approve the full extent of legislation necessary for significant reform in the prison system. For example, in 2009, Governor Schwarzenegger submitted a proposal to the California Senate that would reduce the state prison population by 27,000 and cut the state's prison budget by \$1.2 billion.<sup>30</sup> The

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21. *Id.*

22. *Id.* at 1.

23. Cal. Proclamation No. 4278.

24. *Id.*

25. *Id.*

26. *See id.*

27. *See id.*

28. Office of the Governor, Fact Sheet, Governor Signs AB 900, THE PUBLIC SAFETY AND OFFENDER REHABILITATION SERVICES ACT OF 2007 (2007), available at <http://gov.ca.gov/index.php/?fact-sheet/7557/> (last visited Jan. 22, 2010).

29. *Id.*

30. Steve Wiegand, *Delay in Prison Decision Rescues California Budget Deal*,

State Senate narrowly passed the plan, but the State Assembly passed a watered-down version that would only reduce the prison population by 16,000.<sup>31</sup> The Assembly accepted the original plan's proposal to make some crimes misdemeanors, exempt some low and moderate-risk offenders from parole revocation, permit some probation violators to serve time in county jails, and release inmates who complete certain rehabilitation programs.<sup>32</sup> Yet, this legislation, even if fully implemented, would still result in a prison population that is 30,000 prisoners larger than mandated by the *Coleman/Plata* court to meet constitutional standards.<sup>33</sup> The Assembly increased the grand theft threshold from the 1982 adjustment of \$450 to just \$950, far short of the plan's proposed \$2,500.<sup>34</sup> In addition, the Assembly rejected key provisions to create a sentencing commission and allow sick and elderly inmates to serve terms under house arrest and GPS monitoring.<sup>35</sup>

## 2. Overview of the Prison Litigation Reform Act

In 1996, Congress enacted the PLRA, which created standards for prospective relief in prison condition lawsuits.<sup>36</sup> The PLRA imposes requirements for all forms of prospective relief in prison conditions lawsuits and additional requirements specific to prisoner release orders,<sup>37</sup> which are "remed[ies] of last resort."<sup>38</sup> Moreover, the PLRA limits the power of courts to order states to take certain actions. For example, the PLRA does not permit courts to order defendant states to construct prisons or raise taxes. In some limited circumstances, however, the PLRA expands a prisoner's potential relief

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SACRAMENTO BEE, Jul. 23, 2009, at 3A.

31. Matthew Yi & Wyatt Buchanan, *Plan to Free State Prison Inmates Moves Ahead*, S.F. CHRON., Aug. 21, 2009, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/08/21/MNQS19BFR3.DTL>; Matthew Yi, *Prison Bill Gutted by State Assembly*, S.F. CHRON., Aug. 28, 2009, at D1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/08/28/BA3P19ELN4.DTL>.

32. Yi, *supra* note 31.

33. *Coleman v. Schwarzenegger*, 2009 U.S. Dist. LEXIS 67943, at \*364.

34. *Id.*

35. *Id.*

36. *Gilmore v. California*, 220 F.3d 987, 998 (9th Cir. 2000); Prison Litigation Reform Act, 18 U.S.C. § 3626 (2008).

37. § 3626.

38. Prison Litigation Reform Act, Pub. L. No. 104-134 § 802 (1996). To issue a prisoner release order, a court must have previously ordered less intrusive relief that failed to remedy the Federal right deprivation and the defendant must have had a reasonable amount of time to comply with the court order. Once these two requirements are met, the court must then request a three-judge district court to consider the proposed prisoner release order. The three-judge court must find by clear and convincing evidence that crowding is the primary cause of the Federal right deprivation and that no other relief will remedy the violation. The PLRA also requires that all prospective relief in prison conditions suits be "narrowly drawn" and extend no more than necessary to correct the Federal right violation. In addition, the court must give "substantial weight" to adverse impacts that a prisoner release order may have on public safety and the operation of the criminal justice system. § 3626. See § 3626(a)(1)(A)-(B).

by allowing the court to waive state law under certain conditions.<sup>39</sup>

### 3. Overview of the Coleman/Plata decision

On August 4, 2009, a three-judge federal court found that prison overcrowding violated inmates' constitutional rights and issued a prisoner release order for the California state prison system pursuant to the PLRA.<sup>40</sup> The order required the defendants to provide a plan that would reduce the adult prison population to 137.5% of the prison design capacity.<sup>41</sup> The court gave Governor Schwarzenegger forty-five days to submit the plan.<sup>42</sup>

#### a. Facts and procedural history

The three-judge court order is a result of two lawsuits concerning California prison conditions, *Plata v. Schwarzenegger* and *Coleman v. Schwarzenegger*.<sup>43</sup> The *Coleman* class action lawsuit has carried on for almost two decades.<sup>44</sup> In 1995, a federal district court found that the mental-health care system in California state prisons violated the Eighth Amendment rights of mentally-ill inmates.<sup>45</sup> The court found the mental-health care system inadequate as to access to necessary mental health care,<sup>46</sup> screening for mental illnesses,<sup>47</sup> administration of medication,<sup>48</sup> maintenance of medical records,<sup>49</sup> staffing in mental health care services,<sup>50</sup> and prevention of suicide.<sup>51</sup> Based on these findings, the district court ordered injunctive relief requiring the defendants to develop plans to remedy the situation under the supervision of a special master.<sup>52</sup> The special master has since filed seventy-six reports and the court has issued over seventy orders concerning the remedial process. Still, California could not provide constitutionally adequate mental-health care by the time *Coleman* reached the three-judge court.<sup>53</sup> According to the special master, the growth of California's state prison population is a "major cause" of the state's failure to meet constitutional requirements in its mental-health care

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39. A court may order relief that requires a government official to exceed his authority or violate state or local law if (1) federal law requires the relief to be ordered, (2) the relief is necessary to correct a violation of federal right, and (3) the violation will not be corrected by any other relief. § 3626(a)(1)(B).

40. *Coleman*, 2009 U.S. Dist. LEXIS 67943, at \*394-95.

41. *Id.*

42. *Id.* at \*292.

43. *Id.* at \*45.

44. *Id.* at \*3-5.

45. *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995).

46. *Id.* at 1308, 1309.

47. *Id.* at 1305.

48. *Id.* at 1309.

49. *Id.* at 1314.

50. *Id.* at 1306-07.

51. *Id.* at 1315.

52. *Id.* at 1323-24.

53. *Coleman v. Schwarzenegger*, 2009 U.S. Dist. LEXIS 67943, at \*70, 81.

system.<sup>54</sup> The combination of a growing demand for services due to the increasing prison population, shortage of beds, growing waitlists, and the identification of inmates in need of referrals prevented more mentally-ill inmates from receiving timely and adequate mental care.<sup>55</sup>

In 2001, several state prisoners filed the *Plata* class action lawsuit, claiming constitutional violations in California state prisons relating to its delivery of medical care to inmates.<sup>56</sup> The plaintiffs claimed that the state's failure to provide proper care for prisoners caused "widespread harm, including severe and unnecessary pain, injury and death."<sup>57</sup> They cited numerous deficiencies in the prison medical-care system in the areas of medical screening, access to medical care, response to emergencies, maintenance of medical records, response to medical care complaints, and protocol to respond to chronic illnesses.<sup>58</sup> Despite negotiating a stipulation for injunctive relief, the state failed to improve the medical-care system in its prisons.<sup>59</sup> After concluding that the state had failed to take advantage of every reasonable opportunity to bring its prisons' medical system up to constitutional requirements, the court appointed a receiver to manage the medical-care system.<sup>60</sup> At the time the three-judge panel reviewed *Coleman/Plata*, the receivership was still in place.<sup>61</sup> According to the three-judge panel, overcrowding in the state prison system prevented the receiver from remedying the constitutional violations because the prisons lacked the space and facilities necessary to provide constitutionally adequate medical care.<sup>62</sup>

On June 27, 2007, the *Plata* and *Coleman* courts jointly heard the plaintiffs' motions to convene a three-judge court to consider a prisoner release order under the PLRA.<sup>63</sup> Both courts found ongoing constitutional violations due to overcrowding and determined that a population reduction order might be necessary to remedy the violations.<sup>64</sup> To avoid the risk of inconsistent judgments, the courts recommended that both cases be assigned to the same three-judge court.<sup>65</sup> Agreeing with the courts, the Chief Judge of the Ninth Circuit Court of Appeals convened a three-judge panel to decide whether a

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54. *Id.* at \*101.

55. *Id.* at \*99.

56. *Id.* at \*45-46.

57. *Id.*

58. *Id.* at \*48-49.

59. *Id.* at \*46.

60. *Plata v. Schwarzenegger*, No. C01-1351, 2005 U.S. Dist. LEXIS 43796, at \*1 (N.D. Cal. Oct. 3, 2005) (Findings of Fact & Conclusions of Law Re Appointment of Receiver).

61. *Coleman v. Schwarzenegger*, 2009 U.S. Dist. LEXIS 67943, at \*47.

62. *Id.* at \*47, 48 n.7.

63. *Id.* at \*119.

64. *Plata v. Schwarzenegger*, No. C01-1351, 2007 U.S. Dist. LEXIS 56031, at \*20 (N.D. Cal. July 23, 2007) (order granting Plaintiffs' Motion to Convene Three-Judge Court); *Coleman v. Schwarzenegger*, No. S90-0520, 2007 U.S. Dist. LEXIS 56043, at \*4 (E.D. Cal. July 23, 2007) (order granting Plaintiffs' Motion to Convene Three-Judge Court).

65. *Coleman*, 2007 U.S. Dist. LEXIS 56043, at \*27.

population reduction order met the PLRA standards.<sup>66</sup> The three-judge court is comprised of United States Circuit Court Judge Stephen Reinhardt, Senior United States District Court Judge Lawrence K. Carlton, and Senior United States District Court Judge Thelton E. Henderson.<sup>67</sup>

The three-judge court appointed a referee and a consultant to assist the parties in settlement talks.<sup>68</sup> However, these discussions proved fruitless by June 2008.<sup>69</sup> At the close of trial and final argument from the parties, the court issued a tentative ruling “[t]o assist parties in planning their further actions.”<sup>70</sup> This ruling stated that a reduction order was necessary to remedy constitutional violations in the prisons’ medical and mental health care.<sup>71</sup>

*b. Crowding is the primary cause of the constitutional violations*

The three-judge court found that crowding was the primary cause of California’s inability to provide constitutionally sufficient medical and mental health care.<sup>72</sup> Overcrowding forces prison management to constantly deal with “fighting fires instead of engaging in thoughtful decision-making and planning[,] . . . result[ing] in short-sighted decisions that create even more crisis.”<sup>73</sup> Specifically, overcrowding at reception centers prevents staff from identifying medical problems of new inmates and makes it difficult to administer medical and mental health care to incoming inmates.<sup>74</sup> The overcrowding has also caused the prison system to operate without the necessary space, beds, and staff to provide constitutionally adequate medical and mental-health care.<sup>75</sup> Additionally, overcrowding prevents prisons from proper classification of inmates and the provision of proper housing for inmates based on their needs.<sup>76</sup> Moreover, both the use of non-traditional settings to house inmates, such as triple-bunking inmates in gymnasiums, and the increased use of lockdowns as a method to control overcrowded prisons contribute to the lack of care and spread of infectious disease.<sup>77</sup> Furthermore, the overcrowding contributes to “an unacceptably high” number of otherwise preventable or possibly preventable inmate deaths,<sup>78</sup> and increases the risk of

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66. *Coleman*, 2009 U.S. Dist. LEXIS 67943, at \*125, 137.

67. *Id.*

68. *Id.* at \*125-26.

69. *Id.* at \*126.

70. *Id.* at \*126-27.

71. *Id.*

72. *Id.* at \*43.

73. *Id.* at \*144 (quoting Jeanne Woodford, former warden at San Quentin and former Secretary of CDCR).

74. *Id.* at \*227-228.

75. *Id.* at \*228.

76. *Id.*

77. *Id.* at \*141-42, 228.

78. *Id.* at \*228.

suicide and prevalence of mental illness in the prison system.<sup>79</sup>

*c. A prisoner release order is the only available relief to remedy the constitutional violations in California prisons*

The three-judge court found that a prisoner release order is the only relief that can remedy California's constitutional violations, a finding required by the PLRA before issuing an order.<sup>80</sup> The court considered alternatives to a prisoner release order, including continued remedial efforts by the *Plata* receiver, efforts similar to those of the *Coleman* special master, construction of re-entry or medical facilities, hiring of medical or mental-health staff, and prison expansion.<sup>81</sup> Yet, the court found clear and convincing evidence indicating that the available alternatives would not successfully bring the state prisons' medical and mental-health care systems into constitutional compliance within a reasonable time period.<sup>82</sup> Until the prison population becomes manageable, the prison environment will be one in which medical and mental-health care reforms cannot effectively take root.<sup>83</sup>

*d. The court's population reduction order is narrowly drawn and extends no further than necessary*

Referring to the PLRA's requirement that relief be "narrowly drawn" and "extend[] no further than necessary to correct the violation of the Federal right," the court ordered a reduction in the prison population to 137.5% of the adult institutions' total design capacity,<sup>84</sup> which would require the release of about 46,000 inmates.<sup>85</sup> The plaintiffs proposed a 130% population cap to remedy the on-going constitutional violations, based on the Governor's Facilities Strike Team's recommendation.<sup>86</sup> While some evidence suggested that a cap above 130% might be sufficient to provide constitutionally adequate medical and mental-health care,<sup>87</sup> the plaintiffs successfully demonstrated that the California wardens' suggested 145% cap would not be sufficient.<sup>88</sup> The state did not present evidence indicating that the population cap should be above 130%.<sup>89</sup> In its effort to exercise caution, the court ordered a population reduction halfway between the plaintiff's request and the wardens' estimate while noting that the plaintiffs' may amend the plan if the cap proves

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79. *Id.* at \*228-29.

80. *Id.* at \*43.

81. *Id.* at \*233-53.

82. *Id.* at \*232-233.

83. *Id.* at \*266.

84. *Id.* at \*267 (quoting 18 U.S.C. § 3626(a)(1)(A) (2008)), 268.

85. *Id.* at \*364.

86. *Id.* at \*283.

87. *Id.* at \*285.

88. *Id.* at \*287-88.

89. *Id.* at \*288.

insufficient.<sup>90</sup>

*e. Potential population reduction measures have no negative impact on public safety and operation of the criminal justice system*

The court found that California could comply with the prisoner release order with little or no impact on public safety or the operation of the criminal justice system.<sup>91</sup> To the contrary, the court stated that the evidence indicated that a less crowded system would benefit both public safety and operation of the criminal justice system.<sup>92</sup> The court found that expansion of earned credits<sup>93</sup> and evidence-based programming,<sup>94</sup> as well as diversion of technical parole violators and low-risk offenders to community corrections, would not affect public safety and might even reduce the recidivism rate.<sup>95</sup> Additional measures of sentencing reform and the release of prisoners belonging to groups that are unlikely to re-offend, such as the elderly, sick, or low-risk prisoners who have almost completed their sentences, would not threaten public safety.

*f. The court issued a prison population reduction order*

The court ordered the defendants to submit a plan to reduce the state's prison population, which at the time was approaching 200% of the prisons' design capacity,<sup>96</sup> to 137.5% of the design capacity within two years.<sup>97</sup> The court also required that the state's proposal include the effective dates of the proposed actions and estimates of the reduction in population after six, twelve, eighteen, and twenty-four months.<sup>98</sup> In addition, the court reserved the right to alter the defendants' plan before issuing a court order.<sup>99</sup> Furthermore, the court retained jurisdiction over the matter to ensure compliance with the population reduction plan.<sup>100</sup>

In issuing its order against the state, the court emphasized the need for federal intervention to ameliorate the prison crisis. Observing that California's political branches failed to address the state prison crisis during the nineteen years of the *Coleman* litigation and eight years of the *Plata* litigation, the court stated that where the "political process has utterly failed to protect the

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90. *Id.* at \*290.

91. *Id.* at \*384-85.

92. *Id.* at \*385.

93. The expansion of earned good time credits would allow low and moderate risk inmates to be released from prison a few months early if they follow prison rules and participate in rehabilitation, education, or work programs. *Id.* at \*303.

94. Evidence-based programs are rehabilitation programs proven effective in reducing recidivism. *Id.* at \*334.

95. *Id.* at \*386.

96. *Id.* at \*111.

97. *Id.* at \*394-95.

98. *Id.* at \*395.

99. *Id.* at \*395-96.

100. *Id.* at \*396.

constitutional rights of a minority, the courts can, and must, vindicate those rights.”<sup>101</sup> Yet, the court expressed hope that “California’s leadership will act constructively and cooperatively” to resolve the prison crisis and thus end the need for federal involvement.<sup>102</sup>

#### 4. Overview of state response to the Coleman/Plata decision

In response to the order in *Coleman/Plata*, the Governor submitted a number of suggestions to the Legislature to reduce overcrowding. The Legislature approved some of these suggestions in September 2009 in SB 18, which created felony probationer programming incentives, credit-earning enhancements, and parole reform.<sup>103</sup> However, the Legislature rejected many other proposals, including those to increase the monetary threshold for grand theft, provide alternative housing for low-level offenders, and limit some criminal offenders’ sentences to county jail instead of prison.<sup>104</sup>

With the passage of SB 18, the Legislature created the California Community Corrections Performance Incentives Act of 2009 (“Incentives Act”).<sup>105</sup> Under the Incentives Act, counties will receive funding to implement or expand evidence-based programs for felony probationers.<sup>106</sup> Depending on the success of the programs, the counties may be eligible to receive additional funding.<sup>107</sup> According to the state, the Incentives Act will encourage successful probation programs and thereby reduce the number of probationers returning to prison.<sup>108</sup>

SB 18 also created several credit-earning enhancements.<sup>109</sup> The legislation changed the ratio of days served to credit given for regular prisoners, county jail prisoners and felony parole violators who are returned to prison; instead of receiving a one-day sentence credit for every two days served, inmates will now receive one-to-one sentence credit.<sup>110</sup> In addition, SB 18 permits eligible inmates to receive a maximum of six weeks’ sentence credit

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101. *Id.* at \*393-94 (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST* 103, 173 (1980)).

102. *Id.* at \*394.

103. S.B. 18, 2009 Leg., 3d Extraordinary Session (Cal. 2009), available at [http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb\\_0001-0050/sbx3\\_18\\_bill\\_20091011\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sbx3_18_bill_20091011_chaptered.pdf).

104. Yi, *supra* note 31; California Department of Corrections and Rehabilitation, CDCR Files Response to Federal Three Judge Panel on Prison Management Plan, Nov. 12, 2009, [http://www.cdcr.ca.gov/News/2009\\_Press\\_Releases/Nov\\_12.html](http://www.cdcr.ca.gov/News/2009_Press_Releases/Nov_12.html) (last visited Feb. 28, 2010) [hereinafter CDCR Files Response to Federal Three Judge Panel on Prison Management Plan].

105. SB 18 § 36.

106. *Id.*

107. *Id.* § 41.

108. Exhibit A, Defendants’ Response to the Three-Judge Court’s October 21, 2009 Order, *Coleman v. Schwarzenegger*, No. S90-0520 (E.D. Cal. Nov. 12, 2009); *Plata v. Schwarzenegger*, No. C01-1351 (N.D. Cal. Nov. 12, 2009) [hereinafter Second Plan]. The state estimate that this program will result in a 1,915 reduction in prison population by the December 31, 2011 compliance deadline. *Id.*

109. SB 18.

110. SB 18; Second Plan, *supra* note 108, at 6.

per year for completion of approved programs.<sup>111</sup> Moreover, inmates will receive two-days' sentence credit upon acceptance into the fire-camp program,<sup>112</sup> rather than upon participation in program.<sup>113</sup> The state estimates that these credit-earning enhancements will result in a population reduction of 2,921 by December 31, 2011.<sup>114</sup>

In addition, SB 18 created three changes to the parole system. First, it created a summary parole program. Under this program, the CDCR cannot send low-risk parolees back to prison for parole violations.<sup>115</sup> These credit-earning enhancements will result in an estimated population reduction of 4,556 by December 31, 2011.<sup>116</sup> Second, SB 18 requires that the CDCR use a parole violation decision-making instrument ("PVDMI")<sup>117</sup> to determine appropriate sanctions for parole-violators.<sup>118</sup> The state claims that this program will reduce recidivism and increase public safety by ensuring that parolees are placed in proper programs and that high-risk parole-violators are returned to prison.<sup>119</sup> Third, SB 18 created and expanded drug and mental-health re-entry courts for parolees.<sup>120</sup> These courts will allow parole agents to send parole-violators with drug and mental health needs to treatment programs, rather than sending them back to prison for parole violations related to drug and mental health issues.<sup>121</sup> Such credit-earning enhancements will result in an estimated population reduction of 435 by December 31, 2011.<sup>122</sup>

*a. Overview of the first population reduction plan submitted to the court*

On September 18, 2009, the defendants submitted a population reduction plan to the three-judge court, which was ultimately rejected.<sup>123</sup> The plan only

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111. SB 18 § 39.

112. *Id.* § 41. The fire camp program provides agencies with trained inmates to assist with fire suppression and other emergencies, such as floods and earthquakes. California Department of Corrections and Rehabilitation, Conservation Camps, [http://www.cdcr.ca.gov/Conservation\\_Camps/index.html](http://www.cdcr.ca.gov/Conservation_Camps/index.html) (last visited Feb. 18, 2010).

113. SB 18 § 41; Second Plan, *supra* note 108, at 6.

114. *Id.*

115. SB 18 § 48.

116. Second Plan, *supra* note 108, at 7.

117. PVDMI is a risk assessment tool that accounts for both the severity of a parole violation and a parolee's risk of reoffending. Recidivism predictions are based on demographic and criminal history information. The PVDMI is used to standardize parole decisions, maximize alternative parole violation sanctions, and reserves incarceration for the most dangerous parole violators. Defendants' Population Reduction Plan at 5, *Coleman v. Schwarzenegger*, No. S90-0520 (E.D. Cal. Sept. 18, 2009); Defendants' Population Reduction Plan at 5, *Plata v. Schwarzenegger*, No. C01-1351 (N.D. Cal. Sept. 18, 2009) [hereinafter First Plan].

118. SB 18 § 49.

119. Second Plan, *supra* note 108, at 7.

120. SB 18 § 49.

121. *Id.* § 49.

122. Second Plan, *supra* note 108, at 8.

123. Order Rejecting Defendants' Population Reduction Plan and Directing the Submission of a Plan that Complies with the August 4, 2009 Opinion and Order at 2, *Coleman v.*

provided for a population reduction to 166% of the prisons' design capacity, rather than the required reduction to 137.5% of design capacity.<sup>124</sup> The plan proposed several changes that were approved by the Legislature with the passage of SB 18.<sup>125</sup> These changes include the felony probationer programming incentives, credit-earning enhancements, diversion of low-risk parole-violators from prison, use of a PVDMI, and expansion of drug and mental-health re-entry courts.<sup>126</sup>

In addition to the reforms passed in SB 18,<sup>127</sup> the state proposed administrative reforms.<sup>128</sup> First, the state proposed a 2,500 bed expansion of the California Out-of-State Correctional Facility program ("COCF").<sup>129</sup> Second, the state planned to make better use of community correctional facilities ("CCFs"), which house low-level inmates to prepare them for parole.<sup>130</sup> The CCFs for men have been under-utilized because male inmates tend to qualify for other housing options.<sup>131</sup> Thus, the state suggested better utilization of the CCFs by converting three male CCFs to female CCFs.<sup>132</sup> Third, the state proposed to commute sentences of deportable inmates.<sup>133</sup> Fourth, the state advocated the discharge of parolees who have been deported by the federal government from the state parole system.<sup>134</sup> Fifth, the state proposed making greater use of global positioning systems ("GPS") and other electronic monitoring systems for parole violators, rather than re-incarcerating them.<sup>135</sup>

Moreover, the state described how funds previously allocated under AB 900 would be utilized to aid the state's plan.<sup>136</sup> First, the state proposed to alleviate overcrowding by increasing the prison capacity.<sup>137</sup> For example, the state would build additional housing units that will operate semi-autonomously from already existing prisons.<sup>138</sup> The state would also convert some juvenile correctional facilities to adult male correctional facilities.<sup>139</sup> In addition, the

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Schwarzenegger, No. S90-0520 (E.D. Cal. Oct. 21, 2009); Plata v. Schwarzenegger, No. C01-1351 (N.D. Cal. Oct. 21, 2009) [hereinafter Court Rejection].

124. First Plan, *supra* note 117, at 1.

125. *Id.* at 4-6.

126. *Id.*

127. *Id.*

128. *Id.* at 6.

129. *Id.* at 6, 16. COCF reduces non-traditional beds in California prisons by sending inmates to out-of-state facilities. *Id.* at 6. At the time of the filing of the plan, the state had already transferred about 8,000 inmates to out-of-state facilities. *Id.*

130. *Id.* at 7.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 7-8.

136. *Id.* at 8-14.

137. *Id.* at 8.

138. *Id.*

139. *Id.* at 10.

state would seek the Legislature's approval to redirect \$1 billion from its infill or on-site expansion funding to healthcare funding.<sup>140</sup> Next, the state suggested renovations and expansion of healthcare facilities pursuant to the court order, including working with the *Plata* receiver to add housing, office space or treatment space at various prisons.<sup>141</sup> Finally, the state recommended establishment of reentry facilities throughout California counties for inmates within six to twelve months of release.<sup>142</sup>

Furthermore, the state advocated for additional reforms, but noted that they would require legislative action.<sup>143</sup> First, the state proposed eliminating the 2011 deadline to end the COCF program.<sup>144</sup> Second, the state recommended raising the grand-theft threshold from the current \$400 to \$950 to account for inflation.<sup>145</sup> However, the Legislature previously rejected this proposal.<sup>146</sup> Third, the state suggested legislation to establish an alternative custody program, where the lowest-risk offenders, such as the infirm and elderly, could serve their sentences in home detention and community hospitals with GPS tracking devices.<sup>147</sup> The Assembly also rejected this proposal.<sup>148</sup> Fourth, the state sought legislation to create a permanent and independent sentencing commission to set sentencing guidelines annually.<sup>149</sup> The commission's guidelines would become law, although the Legislature and the Governor could reject the guidelines.<sup>150</sup> The Assembly rejected the proposed commission.<sup>151</sup> Fifth, the state put forth a proposal to accelerate prison construction that was previously approved under AB 900.<sup>152</sup>

*b. Overview of court response to the first plan*

Citing several inadequacies, the three-judge court rejected the defendants' reduction plan on October 21, 2009.<sup>153</sup> The plan did not meet the required reduction to 137.5% of design capacity,<sup>154</sup> nor did it include effective dates for the proposed actions in the plan,<sup>155</sup> nor bi-annual estimates of anticipated population reductions.<sup>156</sup> Staying plaintiffs' request to initiate contempt

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140. *Id.* at 9, n.10.

141. *Id.* at 10-13.

142. *Id.* at 13-14.

143. *Id.* at 16.

144. *Id.*

145. *Id.* at 16-17.

146. *Id.* at 17.

147. *Id.*

148. Yi, *supra* note 31.

149. First Plan, *supra* note 117, at 17.

150. *Id.*

151. Yi, *supra* note 31.

152. First Plan, *supra* note 117.

153. Court Rejection, *supra* note 123, at 2.

154. *Id.*

155. *Id.*

156. *Id.*

proceedings against the state, the court required the state to submit a plan that fulfilled the requirements of the court's August 4th order within twenty-one days.<sup>157</sup> If the state failed to submit an acceptable plan within twenty-one days, the court would order plaintiffs to provide a plan.<sup>158</sup>

Furthermore, the court took judicial notice of two events and imposed additional requirements.<sup>159</sup> First, the court took judicial notice of a CDCR press release issued a day before the state submitted its population reduction plan.<sup>160</sup> The press release described a \$250 million reduction in rehabilitation programs, equating to a one-third reduction in the programs' budget.<sup>161</sup> The court noted that the state's reduction plan relied on this program for some of its population reductions and instructed the state to explain how the budget cut will impact their reduction plan.<sup>162</sup> The court also required the state to update it on the impact of any budget reductions in 2009 on prisons' provision of medical and mental-health care.<sup>163</sup> In addition, the court required the state to describe measures that it will take to "ensure public safety through reentry and diversionary programs."<sup>164</sup> While noting that it is California's decision whether to provide communities with funding to promote community-level rehabilitation and reentry programs, the court required defendants to advise the court of the steps the state will take or has taken to increase, reduce, or eliminate such support since January 2009 and in the future.<sup>165</sup>

Second, the court took judicial notice of the reports that Governor Schwarzenegger submitted a plan to the California Legislature for a population reduction of 37,000 over two years.<sup>166</sup> The court asked the state to verify the amount by which his proposal would reduce the prison population, describe the specifics of the plan, state whether the plan was adopted by the California Senate and the California Assembly and what modifications were made, and recount what the formal recorded vote was if the plan failed in the Assembly.<sup>167</sup>

Dismayed with the state's plan, the court said it was "unaware of any excuse for the state's failure to comply" with its order and warned that it would "view with the utmost seriousness any further failure to comply" with its orders.<sup>168</sup> The court also re-expressed its hope that the state would create its own plan to meet constitutional requirements, but stated that the court would be

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157. *Id.*

158. *Id.*

159. *Id.* at 3.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 4.

167. *Id.* at 4-5.

168. *Id.* at 6.

left with no choice but to develop a plan for the state if it failed to set forth an acceptable plan.<sup>169</sup>

*c. Overview of the second population reduction plan submitted to the court*

On November 12, 2009, the state submitted a second reduction plan.<sup>170</sup> The second plan included proposals from the first plan, two additional proposals, and the omission of the sentencing commission. The state again pointed to changes that were approved in SB 18, such as the felony probationer programming incentives, credit-earning enhancements, diverting low-risk parole violators from prison, the use of a PVDMI, and the expansion of re-entry courts.<sup>171</sup> Additionally, the state resubmitted its administrative plans to expand the state's COCF program, convert male CCFs to female facilities, commute deportable inmates' sentences, discharge deportable parolees, and make greater use of GPS as sanctions for parole violations.<sup>172</sup> Moreover, the state resubmitted its plans pursuant to AB 900, including infill projects, converting juvenile facilities to adult facilities, renovation and expansion of healthcare projects, and establishing more re-entry programs in various counties.<sup>173</sup> Finally, the state resubmitted its proposals requiring legislative approval, including the removal of the 2011 termination date of the COCF program, increasing the monetary threshold of grand theft to \$950, GPS monitoring of lower-risk offenders, and accelerated AB 900 construction.<sup>174</sup>

The state proposed two new methods of population reduction, both of which would require legislative approval and/or waiver of state law. First, the state proposed to increase the number of prison beds by contracting private vendors to house inmates in private facilities within California.<sup>175</sup> Second, the state proposed to require some felony offenders serve time in county jails, rather than state prison.<sup>176</sup> Subject to additional eligibility requirements, the qualifying felonies included: possession of cocaine, possession of methamphetamine, check fraud, various grand theft offenses, receiving stolen property, petty theft with a prior conviction, and theft with a prior conviction.<sup>177</sup>

On January 12, 2010, the three-judge court issued a prison reduction order.<sup>178</sup> At the plaintiffs' request, the court ordered the state to achieve the

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169. *Id.* at 6.

170. Second Plan, *supra* note 108.

171. *Id.* at 5-8.

172. *Id.* at 9-10.

173. *Id.* at 10-17.

174. *Id.* at 18-21.

175. *Id.* at 21-22.

176. *Id.* at 22-23.

177. *Id.*

178. *Coleman v. Schwarzenegger*, No. CIV S-90-0520, 2010 U.S. Dist. LEXIS 2711, at \*34 (N.D. Cal. Jan. 12, 2010) (order to reduce the prison population); *Plata v. Schwarzenegger*, No.

various six-month population reduction benchmarks without ordering any specific population reduction strategy.<sup>179</sup> The court explained that this would provide the state with flexibility in achieving the reduction goals.<sup>180</sup> Under such an order the state would be able to substitute different reduction measures if the state later determined a measure included in its reduction plan might pose a public safety risk.<sup>181</sup>

## II. PROBLEMS AND SOLUTIONS

California's tough-on-crime stance and its politicization of the criminal justice system have contributed to the prison crisis and will likely remain barriers to its resolution. Politics may prevent the successful implementation of the state's population reduction plan. Even if a population reduction plan is effectively implemented, the state will likely request the termination of the order after two years if the constitutional violations are no longer ongoing, as permitted by the PLRA. It seems likely that once the order is terminated, the state prison system will return to crisis in the coming years.

To prevent a return of the prison crisis, an independent commission that is adequately shielded from political pressures must be charged with issuing sentencing guidelines, developing methods to support and increase effective rehabilitation programs, and reform the parole system to become more effective and less technical.

### 1. *California's Tough-on-Crime Politics has Contributed to the Prison Crisis*

California Governors and Legislators have contributed to the prison crisis by politicizing the corrections system and trying to avoid appearing soft on crime.<sup>182</sup> California Legislators have incrementally amended the sentencing structure to lengthen sentences without regard to a cohesive strategy.<sup>183</sup> Statutes have lengthened criminal sentences through numerous amendments by increasing years of incarceration imposed for specific offenses or decreasing judges' discretion regarding sentencing imposition, aggravation or enhancements.<sup>184</sup> The California Penal Code contains over 1,000 felony sentencing laws and more than one hundred felony sentence enhancements.<sup>185</sup>

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C01-1351, 2010 U.S. Dist. LEXIS 2711, at \*34 (N.D. Cal. Jan. 12, 2010) (order to reduce the prison population).

179. *Id.* at \*32.

180. *Id.*

181. *Id.* at \*34.

182. *Coleman v. Schwarzenegger*, 2009 U.S. Dist. LEXIS 67943, at \*393 (stating that "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"); see *TIME IS RUNNING OUT*, *supra* note 3, at i.

183. See *TIME IS RUNNING OUT*, *supra* note 3, at 35.

184. *Id.* at 68.

185. CENTER FOR JUDICIAL EDUCATION AND RESEARCH, *FELONY SENTENCING HANDBOOK*

These incremental changes, largely due to the politicization of the corrections system, are referred to as “drive-by” sentencing laws because they are often created “as knee-jerk responses by lawmakers to horrific, high-profile and frequently isolated crimes.”<sup>186</sup>

The California Legislature and Governors have refused time and time again to create a sentencing commission. Bills that would have created a sentencing commission have been vetoed or allowed to expire by Governors in 1984, 1992, 1994, and 2006.<sup>187</sup> The Legislature also failed to enact bills that would create a commission in 1994, twice in 1995, 1998, 2007, twice in 2008, and 2009.<sup>188</sup> Common objections to sentencing commission bills included concerns that a commission would be soft on crime and result in shorter sentences for criminals,<sup>189</sup> a return to indeterminate sentencing,<sup>190</sup> and fear of

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(2006).

186. *Id.*

187. In 1984, Governor Deukmejian vetoed SB 56. *See* California State Senate, AB 2944 Bill Analysis, [http://info.sen.ca.gov/pub/93-94/bill/asm/ab\\_2901-2950/ab\\_2944\\_cfa\\_940426\\_105434\\_sen\\_comm](http://info.sen.ca.gov/pub/93-94/bill/asm/ab_2901-2950/ab_2944_cfa_940426_105434_sen_comm) (last visited Feb. 28, 2010). In 1992, Governor Wilson vetoed SB 25. *Id.* In 1994, Governor Wilson vetoed AB 2944. *See* Official California Legislative Information, Bill Status, California State Legislature, [http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab\\_2901-2950/a\\_b\\_2944\\_bill\\_status](http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_2901-2950/a_b_2944_bill_status) (last visited Feb. 28, 2010). In 2006, AB 14 died at the governor’s desk. *See* Official California Legislative Information, Bill Status, California State Legislature, [http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab\\_0001-0050/abx2\\_14\\_bill\\_20061130\\_status.html](http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0001-0050/abx2_14_bill_20061130_status.html) (last visited Feb. 28, 2010).

188. In 1994, AB 43 failed to pass committee. *See* Official California Legislative Information, Bill Status, California State Legislature, [http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab\\_0001-0050/abx1\\_43\\_bill\\_status](http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_0001-0050/abx1_43_bill_status) (last visited Feb. 28, 2010). In 1995, both SB 166 and AB 1036 failed in committee. *See* Official California Legislative Information, Bill Status, California State Legislature, [http://www.leginfo.ca.gov/pub/95-96/bill/sen/sb\\_0151-0200/sb\\_166\\_bill\\_status.html](http://www.leginfo.ca.gov/pub/95-96/bill/sen/sb_0151-0200/sb_166_bill_status.html) (last visited Feb. 28, 2010); Official California Legislative Information, Bill Status, California State Legislature, [http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab\\_1001-1050/ab\\_1036\\_bill\\_status.html](http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_1001-1050/ab_1036_bill_status.html) (last visited Feb. 28, 2010). In 1998, SB 670 stalled in the Assembly. In 2007, AB 160 died in the Senate. *See* Official California Legislative Information, Bill Status, California State Legislature, [http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab\\_0151-0200/ab\\_160\\_bill\\_20081204\\_status.html](http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0151-0200/ab_160_bill_20081204_status.html) (last visited Feb. 28, 2010). In 2008, AB 1708 died in Assembly and SB 110 died in a Senate committee. *See* Official California Legislative Information, Bill Status, California State Legislature, [http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab\\_1701-1750/ab\\_1708\\_bill\\_20081204\\_status.html](http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_1701-1750/ab_1708_bill_20081204_status.html) (last visited Feb. 28, 2010); Official California Legislative Information, Bill Status, California State Legislature, [http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb\\_0101-0150/sb\\_110\\_bill\\_20081204\\_status.html](http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0101-0150/sb_110_bill_20081204_status.html) (last visited Feb. 28, 2010). In 2009, the sentencing commission portion of ABX3 14 failed to muster support in the Assembly. *See* Official California Legislative Information, Bill Status, California State Legislature, [http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab\\_0001-0050/abx3\\_14\\_bill\\_20091105\\_status.html](http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0001-0050/abx3_14_bill_20091105_status.html) (last visited Feb. 28, 2010).

189. The Committee on Moral Concerns opposed AB 1036 in 1995 because it claimed that a commission would shorten non-violent sentences, including drug-related offenses. The Committee argued that “with today’s current drug problems, this is hardly the time to go easy on drug pushers.” *TIME IS RUNNING OUT*, *supra* note 3, at 65 (quoting Letter from Art Croney to Assembly member John Vasconcellos on AB 1036 (Mar. 29, 1995) (on file with the California State Archives, Committee on Moral Concerns)). Opponents of the 2009 proposal called the commission “a thinly veiled attempt to soften punishment for crime that would backfire by placing more offenders on the street.” Jim Sanders, *Sentencing Panel Plan Stalls in California*

an unelected body making decisions impacting public safety.<sup>191</sup> Further, commission plans faced opposition due to concerns about costs<sup>192</sup> and disagreements about the composition and appointment of commission members.<sup>193</sup>

The politicization of the criminal system in California has prevented other efforts to remedy the looming prison crisis. In 2004, the Governor attempted to implement a reformed parole system to allow low-level, non-violent parole violators to serve jail time, enroll in substance abuse treatment, or fulfill other community-based punishments.<sup>194</sup> The plan would have resulted in a \$150 million savings within two years.<sup>195</sup> In 2005, a group funded by the California Correctional Peace Officers Association aired television commercials alleging the Governor's parole reforms put communities at risk by keeping "murderers, rapists and child molesters on our streets."<sup>196</sup> By April of that year, the parole reforms were terminated.<sup>197</sup> While the CDCR Secretary explained the change in policy was due to the fact that there was no evidence that the reforms were actually effective, many believed programs were terminated to stop political criticisms.<sup>198</sup>

California's politics also negatively affect the leadership in the CDCR. First, the state's politics prevent the CDCR from maintaining the stable

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*Assembly*, SACRAMENTO BEE, Aug. 25, 2009, at 3A, available at <http://www.sacbee.com/2009/08/25/2136300/sentencing-panel-plan-stalls-in.html> (last visited Feb. 18, 2010).

190. Governor Wilson opposed AB 2944 in 1994, claiming that the bill would favor indeterminate sentencing, which he stated was discredited in the 1970s and was disfavored by the public. Governor Wilson also opposed SB 25 in 1992 because the proposed presumptive sentencing would undermine twenty-five years of law. *TIME IS RUNNING OUT*, *supra* note 3, at 64-63.

191. According to Stanford Law School Professor Robert Weisberg, "The very term 'sentencing commission' has become pretty toxic in California politics . . . It's often alleged that they take sentencing power away from the legislature." Michael B. Farrell, *California Assembly Passes Diluted Prison Reform Bill*, THE CHRISTIAN SCI. MONITOR, Sept. 2, 2009, <http://www.csmonitor.com/USA/2009/0902/p02s04-usgn.html> (last visited, Feb. 18, 2010)(quoting Weisberg). In 1984, Governor Deukmejian opposed SB 56 because he believed setting prison sentences was a responsibility of the Legislature, which is accountable to the state's voters, rather than an unelected commission. *TIME IS RUNNING OUT*, *supra* note 3, at 65. Assemblyman Pedro Nava opposed the 2009 sentencing commission which was proposed to make commission recommendations law unless rejected by the Legislature and Governor, because "[y]ou essentially would be contracting out your duties as a legislator." Sanders, *supra* note 189.

192. The Department of Finance objected to the "indeterminate" costs of a commission. *TIME IS RUNNING OUT*, *supra* note 3, at 65.

193. In 1984, the California Attorneys for Criminal Justice objected to SB 56 because it felt the commission would have too many members with law enforcement and correctional interests. The organization also preferred the commission include a member of a prisoner's rights group. Other general concern from the public included disagreement about whether the Governor should have the power to appoint the members of the commission. *Id.* at 65.

194. *Id.* at 2.

195. *Id.*

196. *Id.* at 2-3.

197. *Id.*

198. *Id.* at 3.

leadership necessary to fix the prison crisis. For example, the CDCR lost two secretaries to resignation in the same year.<sup>199</sup> Both former secretaries testified before a federal judge that they resigned because politics prevented them from resolving the prison crisis with good policy.<sup>200</sup> Resignations due to constant political stonewalling are problematic because stable leadership is a “key condition” to implement the necessary reforms in the state prison system.<sup>201</sup> Second, California’s politics inhibit the CDCR’s ability to recruit strong candidates to serve as secretary. According to one recognized correctional administrator, California’s political climate will prevent the state from attracting individuals with the requisite leadership and skills to succeed as CDCR Secretary.<sup>202</sup>

2. *California’s Politics May Prevent Effective Implementation of the State’s Population Reduction Plan*

California faces several barriers to the successful implementation of a court-ordered population reduction plan. California might experience the same ineffectiveness and breakdown as in *Coleman* and *Plata*, despite the courts’ appointments of a special master and receiver. Additionally, while California’s current governor has been supportive of prison reform, the winner of the 2010 gubernatorial election may be less interested in prison reform, especially if his or her platform includes a tough-on-crime stance. This may lead to a situation where the executive branch is not willing to cooperate or continue policies put in place pursuant to the court order.

Members of the Legislature have already indicated opposition to methods of prison population reduction or improvement of prison conditions. The Assembly only passed the recent prison reform bill, SB 18, after significantly weakening its provisions.<sup>203</sup> Further, the bill passed with no Republican support<sup>204</sup> and only about half of the Assembly’s Democratic members supported the bill due to worries about appearing soft on crime.<sup>205</sup> At the same time, the politically powerful California Correctional Peace Officers Association opposed SB 18. They printed an advertisement accusing Governor Schwarzenegger of making risky parole reform that would lead to the loss of

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199. In 2006, former CDCR Secretaries Hickman and Woodford both abruptly resigned. *Id.* at 2.

200. *Id.* at 2, i.

201. *Id.* at 5. See also *id.* at 5 (statement of Dr. Reginald Wilkinson, former Director, Ohio Department of Rehabilitation and Correction that stability in correction agency leadership as an important factor in agency success).

202. *Id.* at i-ii.

203. Posting of Dan Walters to Sacramento Bee—Capitol Alert, <http://www.sacbee.com/static/weblogs/capitolalertlatest/2009/09/assembly-will-t.html> (Sept. 11, 2009).

204. Soloman Moore, *California State Assembly Approves Prison Legislation*, THE N.Y. TIMES, Sept. 1, 2009, at A19, available at <http://www.nytimes.com/2009/09/01/us/01prison.html>.

205. *Id.*; Walters, *supra* note 203.

innocent lives.<sup>206</sup> The ad read: “For the past few years, you’ve been quietly dumping more and more parolees on the street, with less and less supervision and no business being free . . . . Now 17-year-old Lily Burk is dead.”<sup>207</sup> One Senator characterized SB 18’s proposed reforms as “‘get out of jail free card’ legislation.”<sup>208</sup> In response to the state’s population reduction plan that outlined discharging deported parolees from the parole system, one Assemblyman warned, in reference to the deported parolees, “there will be no parole supervision or control when they illegally (and they will) come back.”<sup>209</sup> In response to efforts to improve inmate medical treatment, one Democratic Assemblywoman opposed the construction of what she describes as a “Taj Mahal” medical center for prisoners because it will take funding away from the elderly, disabled, blind, and veterans.<sup>210</sup>

### 3. *State Politics Serve as a Barrier to Long-Term Resolution of the Prison Crisis*

Numerous studies have been conducted on the prison crisis and all have similar conclusions about the steps necessary to solve California’s prison crisis—reform the state’s sentencing structure, parole system, rehabilitation programs, and community-based alternatives.<sup>211</sup> A sentencing commission is needed to study the impact of current sentences and to create new sentencing guidelines.<sup>212</sup> Suggested parole reform includes expanding re-entry programs,<sup>213</sup> creating intermediate sanctions for parole violations,<sup>214</sup> and focusing attention on parolees who commit new and serious crimes.<sup>215</sup> Educational programs, job training, and substance-abuse programs need to be

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206. Moore, *supra* note 204.

207. *Id.*

208. Senator Sam Aanestad, *News, Senate Passes “Get Out of Jail Free Card” Legislation*, Sept. 1, 2009, <http://cssrc.us/web/4/publications.aspx?id=6743&AspxAutoDetectCookieSupport=1> (last visited Feb. 28, 2010).

209. Jim Nielsen, *Op-Ed, Citizens at Risk, Justice Undone*, Nov. 11, 2009, <http://arc.asm.ca.gov/member/2/?p=article&sid=208&id=221822> (last visited Feb. 28, 2010).

210. Scott Smith, *More Foes of Prison Hospital*, RECORDNET.COM, Dec. 19, 2009, [http://www.recordnet.com/apps/pbcs.dll/article?AID=/20091219/A\\_NEWS/912190318](http://www.recordnet.com/apps/pbcs.dll/article?AID=/20091219/A_NEWS/912190318) (last visited Feb. 28, 2010).

211. See LITTLE HOOVER COMMISSION, *BACK TO THE COMMUNITY: SAFE AND SOUND PAROLE POLICIES* (2003) [hereinafter *SAFE AND SOUND PAROLE POLICIES*]; *TIME IS RUNNING OUT*, *supra* note 3; BLUE RIBBON COMMISSION, *supra* note 16; CORRECTIONS INDEPENDENT REVIEW PANEL, *REFORMING CALIFORNIA’S YOUTH AND ADULT CORRECTIONAL SYSTEM* (2004); NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *TASK FORCE ON CALIFORNIA PRISON OVERCROWDING: RESPONDING TO CALIFORNIA’S PRISON CRISIS* (2006) [hereinafter *TASK FORCE ON CALIFORNIA PRISON OVERCROWDING*].

212. *TIME IS RUNNING OUT*, *supra* note 3; BLUE RIBBON COMMISSION, *supra* note 16; CORRECTIONS INDEPENDENT REVIEW PANEL, *supra* note 211; *TASK FORCE ON CALIFORNIA PRISON OVERCROWDING*, *supra* note 211.

213. CORRECTIONS INDEPENDENT REVIEW PANEL, *supra* note 211.

214. *TASK FORCE ON CALIFORNIA PRISON OVERCROWDING*, *supra* note 211.

215. *SAFE AND SOUND PAROLE POLICIES*, *supra* note 211.

improved and expanded so that inmates will be better prepared for re-entry into communities and less likely to return to the prison system.<sup>216</sup> Community-based alternatives could include releasing low-risk offenders to community supervision,<sup>217</sup> developing and funding community-based intermediate punishments for low-level offenders,<sup>218</sup> and moving low-risk female offenders to community-based facilities.<sup>219</sup> Additionally, at least one study suggested that the state develop a plan for the prison medical system with a health care provider or university in order to restore confidence in the state's ability to run the entire prison system and to attract qualified management to the CDCR.<sup>220</sup>

Despite the availability of recommendations from numerous commissions and studies, long-term change in the California prison system is unlikely. Even if the state's plan is implemented, the plan will not likely be permanent because the PLRA allows for any party, including the state, to request the termination of the order after two years if the constitutional violations are no longer ongoing. Thus, once the state achieves the 137.5% population cap, the new Governor could seek termination of the court-ordered reform.

If the court order is terminated, the waiver of state laws that the three-judge court issued to enable the state to comply with the court order will no longer apply. As a result, California will revert back to policies it had before it was forced to reform. More importantly, the Governor and Legislature will have to overcome the same political issues if either pursues the legislative process to implement reforms after the order is terminated. If state lawmakers do not seek to continue reform policies, the prison population will increase. Thus, California prisons can easily reach the same level of prison overcrowding and constitutional violations that prompted the prisoner release order within a few years of the order's termination.

The Legislature will likely resist continuing prison and sentencing reform after the court order is terminated, thereby allowing the prison system to quickly slip back into its pre-court order state. Such resistance has been demonstrated by the Legislature's refusal to pass prison-reform policies, even in the face of a forty-five-day deadline from the specially convened three-judge court. Neither the threat of having a federal court override the Legislature's authority and dictate the state's policies, nor the national media attention highlighting the long-standing crisis and ineffectiveness of California's Legislators have prompted legislative action.

The Legislature seems particularly resistant to effective reforms that

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216. TIME IS RUNNING OUT, *supra* note 3, at 24; BLUE RIBBON COMMISSION, *supra* note 16; CORRECTIONS INDEPENDENT REVIEW PANEL, *supra* note 211; TASK FORCE ON CALIFORNIA PRISON OVERCROWDING, *supra* note 211.

217. CORRECTIONS INDEPENDENT REVIEW PANEL, *supra* note 211.

218. TIME IS RUNNING OUT, *supra* note 3; BLUE RIBBON COMMISSION, *supra* note 16.

219. TASK FORCE ON CALIFORNIA PRISON OVERCROWDING, *supra* note 211.

220. TIME IS RUNNING OUT, *supra* note 3, at iii.

address issues of sentencing, rehabilitation, and the parole system. The only parts of the Governor's plan that the Legislature approved were those to build more prisons and send inmates to prisons in other states. Presumably, these policies are perceived as politically popular and more in line with the "tough on crime" mentality that has dominated many of California's elections. If the order is terminated, California will likely keep pursuing these policies that maintain or increase the high prison population, but not other reforms that would cut the prison population. Such a course is problematic because while transferring inmates temporarily decreases crowding, it does not effectively decrease the number of individuals entering the system. Similarly, building more prisons does not decrease the incarceration rate in California. If harsh sentences are not changed, technical parole violators are automatically sent to prison, and rehabilitation programs are not improved, these new prisons will soon become overcrowded. Indeed, the state already expects that the prison population will grow in the future.<sup>221</sup>

While it is unclear what position the future executive branch will take on prison reform, the current executive branch's actions are not hopeful indicators. The Governor resubmitted every aspect of his first population reduction plan in his second reduction plan, except his proposal for a sentencing commission. In addition, CDCR Secretary Matthew Cate indicated that he believed the first population reduction plan was the better option for the state.<sup>222</sup> Further, the CDCR's press release regarding the second plan submitted to the three-judge panel failed to mention that the plan included diverting some felons to jail, while every other aspect of the plan was mentioned.<sup>223</sup>

Even if the new Governor supports continuing the policies of the reduction plan, it is likely any new executive will resist actually pursuing effective reforms. He or she will feel political pressure to revert back to pre-court order practices if a horrific or high-profile crime is committed in California, especially if a parolee or low-risk offender who was released from prison commits the crime. The Maurice Clemmons case, in which a man was suspected of killing four police officers in Washington during release on bail for pending charges committed while on parole,<sup>224</sup> has been used as a reason to oppose compliance with the three-judge court's population reduction order. One California county's chief of police warned that "California prisons are filled with Clemmons types," the state is "disguising" its release of career criminals by describing them as nonviolent criminals, and one of these so-called nonviolent criminals will commit "a brutal murder like Clemmons

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221. See Second Plan, *supra* note 108, at 5.

222. See CDCR Files Response to Federal Three Judge Panel on Prison Management, *supra* note 104.

223. *Id.*

224. William Yardley, *State Battles Over Parole Issue in Killings*, N.Y. TIMES, Dec. 3, 2009, at A29, available at <http://www.nytimes.com/2009/12/03/us/03tacoma.html> (last visited Feb. 28, 2009).

did.”<sup>225</sup> Similarly, California Republicans and law enforcement groups pointed to the Jaycee Lee Dugard case, where a girl was kidnapped, sexually abused, and held for eighteen years in California by a man on parole for rape,<sup>226</sup> as a reason to oppose changes in the state’s parole system.<sup>227</sup> Such cases set the stage for “drive-by” sentencing and make politicians fearful of appearing soft on crime.

#### 4. *California Needs an Independent Commission to Resolve the Prison Crisis in the Long-Term*

The Legislature and Governor are unlikely to successfully address the prison crisis in the long term. Thus, California needs to establish an independent commission that is shielded from political pressure and has authority to implement effective corrections policies.<sup>228</sup> This commission should implement policies similar to those proposed by numerous independent commissions and studies to decrease prison crowding and recidivism rates. These proposals include improvements in rehabilitation and re-entry programs, such as creating a system that encourages offenders to complete rehabilitation programs,<sup>229</sup> selecting rehabilitation programs based on each offender’s individual needs and risk assessment,<sup>230</sup> providing evidence-based rehabilitation programs in prisons,<sup>231</sup> and developing and modifying community programs.<sup>232</sup> Necessary parole reform includes developing a

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225. Garr Nielson, *Public Safety Is an Investment, Not a Cost*, TIMES-STANDARD ONLINE, Dec. 20, 2009, [http://www.times-standard.com/othervoices/ci\\_14007997](http://www.times-standard.com/othervoices/ci_14007997) (last visited Feb. 28, 2009).

226. Michael B. Farrell, *Jaycee Lee Dugard Case Highlights Flawed, Overburdened California Parole System*, ABC NEWS.COM, September 5, 2009, <http://abcnews.go.com/US/jaycee-lee-dugard-case-highlights-californias-troubled-parole/story?id=8492727>.

227. *Id.*; Moore, *supra* note 204.

228. The Little Hoover Commission recommended that the Governor and Legislature gather the political will to effectively manage the prison crisis. As an alternative, the Commission proposed a board responsible for promulgating policies within the corrections system. TIME IS RUNNING OUT, *supra* note 3, at iv-v. Other studies and sources have also proposed sentencing commissions. See e.g., TIME IS RUNNING OUT, *supra* note 3, at 68 (stating that “further analysis . . . [of the California sentencing structure, amendments to sentencing laws, and the effect of those amendments on lengthening prison terms] will be key to reforming California’s sentencing system. A sentencing commission is the only type of entity that has the expertise and the resources to undertake a thorough review of the provisions of the [California Penal] Code.”); BLUE RIBBON COMMISSION, *supra* note 16; CORRECTIONS INDEPENDENT REVIEW PANEL, *supra* note 211; TASK FORCE ON CALIFORNIA PRISON OVERCROWDING, *supra* note 211; Model Penal Code, Sentencing, § 1.02(2) (Discussion Draft 4 2006) (recommending states establish permanent sentencing commissions); Model Penal Code, Sentencing, Reporter’s Introduction at 7 (Report 49 2006) (stating that sentencing commissions allow for more consistent application of law and better information regarding the sentencing system).

229. CDCR EXPERT PANEL, *supra* note 13, at 50.

230. *Id.*

231. *Id.* See BLUE RIBBON COMMISSION, *supra* note 16, at 7 (recommending implementation of a program that deals with substance abuse while in prison).

232. See CDCR EXPERT PANEL, *supra* note 13, at 50 (advocating for developing and

graduated parole-sanction policy with alternatives to incarceration based on a parolee's risk to reoffend and seriousness of the violation.<sup>233</sup> The commission should also improve the efficacy and clarity of California's sentencing structure, including the addition of intermediate sanctions and local punishment options.<sup>234</sup>

Sentencing commissions have successfully reduced crime rates in other states, while maintaining reasonable tough-on-crime stances. In 1990, after three years of political debate, North Carolina created a sentencing commission to repair a criminal justice system that had lost the public's confidence.<sup>235</sup> Contrary to the some of the problems California currently faces, North Carolina's felons only served fractions of their sentences.<sup>236</sup> The sentencing commission expanded community-based sanctions and recommended sentencing guidelines be based on the offender's crime and record.<sup>237</sup> The commission also increased violent crime sentences while it prevented low-level offenders from becoming violent offenders by increasing spending on alternative sanctions, probation and drug treatment programs.<sup>238</sup> The North Carolina Legislature ultimately adopted these reforms, thereby decreasing crime rates and saving billions.<sup>239</sup> This now-permanent commission continues to advise the Legislature on sentencing policy through assessments and prison population projections.<sup>240</sup>

Another successful commission was established by Virginia's newly-elected Governor George Allen, who campaigned for longer sentences for violent crimes and eliminating parole.<sup>241</sup> This commission included Republican and Democratic legislators, prosecutors, law enforcement, crime

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modifying community re-entry programs to better suit the needs of parolees); BLUE RIBBON COMMISSION, *supra* note 16, at 6 (recommending expansion of community-based intermediate punishments, including electronic surveillance, intensive probation supervision, mother-child programs, victim restitution programs, and substance-abuse residential treatment).

233. CDCR EXPERT PANEL, *supra* note 13, at 50. See BLUE RIBBON COMMISSION, *supra* note 16, at 7 (recommending significant expansion of intermediate sanctions for parole violators).

234. BLUE RIBBON COMMISSION, *supra* note 16, at 97.

235. TIME IS RUNNING OUT, *supra* note 3, at 40.

236. *Id.*

237. *Id.*

238. *Id.* at 40, 33 (citing Testimony to the Little Hoover Commission (Cal. 2006) (statement of Thomas W. Ross, Executive Director, Z. Smith Reynolds Foundation; former Chair, North Carolina Sentencing and Policy Advisory Commission; and, former Director, North Carolina Administrative Office of the Courts)).

239. *Id.* at 40, 33 (citing Testimony to the Little Hoover Commission (Cal. 2006) (statement of Thomas W. Ross, Executive Director, Z. Smith Reynolds Foundation; former Chair, North Carolina Sentencing and Policy Advisory Commission; and, former Director, North Carolina Administrative Office of the Courts)).

240. See The North Carolina Court System, Sentencing and Policy Commission, <http://www.nccourts.org/Courts/CRS/Councils/spac/Default.asp> (last visited Feb. 21, 2010); TIME IS RUNNING OUT, *supra* note 3, at 40.

241. TIME IS RUNNING OUT, *supra* note 3, at 40-41.

victims, judges, and legal scholars.<sup>242</sup> Further, the state provided the commission with a well-staffed team of experts in criminology, government, psychology, and statistics from the state's criminal justice research center.<sup>243</sup> The center's research indicated the state was failing to protect public safety because it was incarcerating older, non-violent offenders longer than younger, violent offenders.<sup>244</sup> In response to this research, the commission tripled sentences for younger and more violent offenders and diverted low-level offenders to alternative community-based punishment.<sup>245</sup> As a result, the state was able to implement tough-on-crime policies, while also reducing crime rates and saving state funds.<sup>246</sup> This now-permanent commission is responsible for annually revising sentences and developing a risk-assessment tool to help judges divert low-level, non-violent offenders to community-based sanctions.<sup>247</sup> The commission's recommendations become law unless the Legislature overrides the revisions.<sup>248</sup>

The Federal Base Closure and Realignment Commission ("BRAC") also serves as an example of an independent commission successfully making difficult decisions on politicized issues. No longer able to financially support the nation's extensive military bases and installations, from the late 1980s to the mid-1990s the federal government closed unnecessary military bases.<sup>249</sup> Estimated to save the federal budget at least \$4.6 billion a year, the base closures provided savings that were needed to pay for future weapons, training, and troop salaries.<sup>250</sup> Because many civilian jobs would be lost in an area surrounding a closed base, base closures were politically unpopular decisions: in the 1993 round of base closures, Florida lost 18,500 jobs, Virginia lost 13,000 jobs and California lost 12,800 jobs.<sup>251</sup> As a result of the political unpopularity of the necessary base closure, Congress created BRAC, which provided "political cover" to make the difficult decision to close over seventy bases in four separate rounds of closures.<sup>252</sup>

BRAC is an independent and authoritative commission charged with providing the President and Congress with recommendations and analysis

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242. *Id.* at 41.

243. *Id.* at 41.

244. *Id.* at 41.

245. *Id.* at 33, 40 (citing Testimony to the Little Hoover Commission (Cal. 2006) (statement of Richard P. Kern, Ph.D., Director, Virginia Criminal Sentencing Commission)).

246. *Id.* at 33 (citing Testimony to the Little Hoover Commission (Cal. 2006) (statement of Richard P. Kern, Ph.D., Director, Virginia Criminal Sentencing Commission)).

247. *Id.* at 41.

248. *Id.* at 41.

249. Eric Schmitt, *Defense Dept. May Postpone Base Closings*, N.Y. TIMES, May 5, 1994, at A1, available at <http://www.nytimes.com/1994/05/05/us/defense-dept-may-postpone-base-closings.html?pagewanted=1>.

250. *Id.*

251. *Id.*

252. *Id.*

concerning base closures that the Department of Defense (“DoD”) recommended be closed.<sup>253</sup> The commission may use criteria outlined by Congress to reject DoD’s recommendations and to suggest other military installations be closed.<sup>254</sup> BRAC publically reports its findings to the President, who can return the report to BRAC for further analysis or forward BRAC’s list of suggested base closures to Congress.<sup>255</sup> If Congress does not issue a joint resolution rejecting BRAC’s findings within forty-five days, the BRAC report becomes law.<sup>256</sup> Alternatively, the President may essentially veto BRAC recommendations by refusing to forward BRAC’s report to Congress.<sup>257</sup> BRAC’s analysis and recommendations allow both the President and Congress to approve or reject which bases close through a seemingly independent body, thereby making decisions “which otherwise would not be politically feasible.”<sup>258</sup>

While many states currently have sentencing commissions,<sup>259</sup> not all sentencing commissions succeed.<sup>260</sup> The unsuccessful commissions are commonly temporary and lack support from the judicial or political branches.<sup>261</sup> In contrast, successful commissions are usually permanent, and can thus evaluate sentencing policy over time.<sup>262</sup>

While a sentencing commission was presented in the state’s first plan submitted to the three-judge court, the commission’s authority was too narrow in scope. The plan neither adequately detailed the selection of commission members nor the ability of the Legislature or Governor to reject the commission’s sentencing guidelines. To achieve effective and comprehensive policies in the corrections system, California needs a commission that is charged with more than promulgating sentencing guidelines. The commission must determine sentencing, rehabilitation policies, and parole policies. Furthermore, the commission must be permanent, in order to effectively monitor and refine sentencing policy over time.<sup>263</sup>

The California commission should have attributes that have led to success

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253. Defense Base Closure and Realignment Commission, <http://www.brac.gov/>; TIME IS RUNNING OUT, *supra* note 3, at 11.

254. TIME IS RUNNING OUT, *supra* note 3, at 11.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* See also Defense Base Closure and Realignment Commission, *supra* note 253.

259. As of 2006, the jurisdictions with sentencing commissions included: Alabama, Alaska, Arkansas, Delaware, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Utah, Virginia, Washington, Wisconsin, the federal government, and the District of Columbia. See National Association of State Sentencing Commissions, Contact List (2006), available at <http://www.ussc.gov/states/nascaddr.htm> (last visited Feb. 21, 2010).

260. TIME IS RUNNING OUT, *supra* note 3, at 42.

261. *Id.*

262. *Id.*

263. *See id.*

in other commissions. Similar to Virginia's successful sentencing commission, California's commission should include Republican and Democratic legislators, prosecutors, law enforcement, crime victims, judges, and legal scholars.<sup>264</sup> Also following Virginia's example, California's commission needs a fully-staffed team of experts in criminology, government, psychology, and statistics so that the commission may make informed and effective sentencing policy.<sup>265</sup>

To shield the commission from political pressures, commissioners should receive lifetime or long-term appointments revocable only for good cause. Additionally, to maintain accountability, while insulating the commission from politics, the commission's policies should be eligible for rejection by the Legislature. However, the bar for such rejection should be high; only a two-thirds vote in both houses should overrule the commission's policies. Similar to BRAC, politicians can preserve their political image by blaming politically unpopular policies on the commission. Politicians can further deflect criticism by saying that while they do not support the policy there is not enough support in the Legislature to meet the high vote requirement to overturn the policy. At the same time, if the commission promulgates policies that are completely out of touch with the state's values, the Legislature will be able to muster a two-thirds vote to prevent implementation of the policy. Contrary to some studies' recommendations, a gubernatorial veto should not overturn the commission's policies because such a system will allow a governor to single-handedly roadblock reform and re-politicize the prison crisis.<sup>266</sup>

#### CONCLUSION

The state's political history raises concerns about whether the Legislature can successfully set-up an independent commission to effectively deal with California's prison crisis. However, an independent commission is a better option for the state than relying on the Legislature to enact all reforms necessary to resolve the prison crisis in the long term. The establishment of a commission only requires lawmakers to agree on politicized reform once, whereas relying on the Legislature to make long-term prison reform requires lawmakers to agree on politicized reform multiple times.

An independent commission will allow policymakers who are insulated from politics to make responsible decisions that would otherwise be difficult for politicians, especially California's legislators. This is not to say, however, that no issues would arise were such a commission successfully created. For example, the Legislature might be unwilling to provide the funding necessary to implement controversial commission policies. Ideally, the Legislature and Executive would work cooperatively with the commission. However, this

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264. *See id.* at 41.

265. *See id.*

266. *Cf. id.* at iv-v.

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problem might also be alleviated by requiring the Legislature to allocate funds for the commission's policies in a lump sum before the commission unveils its new policies. Another potential problem is that "drive-by" sentencing and sentencing laws created by referendum might subvert commission policies. No solution seems to be readily available, but perhaps the commission could develop a method to incorporate such sentencing issues into its overall policy strategy.

Despite its shortcomings, establishing an independent commission will enable California to achieve a long-lasting solution to the prison crisis. California lawmakers lacked the political will to solve the prison crisis in the past, thereby requiring a federal court to force California into prison reform. After the court terminates its order, it is unlikely that California lawmakers will have the necessary political will to maintain reform efforts and prevent a second prison crisis. Thus, an independent commission is necessary to force California into long-term prison reform.

