

2013


## Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics

Margo Schlanger

*University of Michigan Law School, mschlan@umich.edu*

Available at: <https://repository.law.umich.edu/articles/463>

Follow this and additional works at: <https://repository.law.umich.edu/articles>

 Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), [Law Enforcement and Corrections Commons](#), [Litigation Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Schlanger, Margo (2009- ). "Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics." *Harv. C. R. -C. L. L. Rev.* 48, no. 1 (2013): 165-215.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# *Plata v. Brown* and Realignment: Jails, Prisons, Courts, and Politics

---

Margo Schlanger\*

## INTRODUCTION

The year 2011 marked an important milestone in American institutional reform litigation. That year, a bare majority of the U.S. Supreme Court, in an opinion in *Brown v. Plata* by Justice Anthony Kennedy, affirmed a district court order requiring California to remedy its longstanding constitutional deficits in prison medical and mental health care by reducing prison crowding.<sup>1</sup> Not since 1978 had the Court ratified a lower court's crowding-related order in a jail or prison case,<sup>2</sup> and the order before the Court in 2011 was fairly aggressive; theoretically, it could have (although this was never a real prospect) induced the release of tens of thousands of sentenced prisoners or the expenditure of billions of dollars in new prison construction. Indeed, Justice Scalia, in dissent, labeled the proceedings that produced the order "a judicial travesty" and characterized the order itself as "perhaps the most radical injunction issued by a court in our Nation's history."<sup>3</sup>

The prison population order before the Court had been issued by a unanimous three-judge district court in two longstanding federal civil rights cases, *Plata v. Brown* and *Coleman v. Brown*, consolidated for consideration of entry of such an order. The *Plata/Coleman* order requires California's state prisons to limit prison population to 137.5% of the rated capacity of California's prisons by the end of 2013;<sup>4</sup> absent construction, that works out to a bit under 110,000 prisoners — about equal to the state prison population

---

\* Professor of Law, University of Michigan. Thanks to the many participants in the *Plata* and *Coleman* litigations who shared their time, expertise, and observations with me. A list is included *infra* note 13. Thanks also for their helpful comments to Don Herzog, Mona Lynch, Anjali Verma, my Michigan colleagues who participated in our summer brown bag workshop, and as always, to Sam Bagenstos. All remaining errors are, of course, mine.

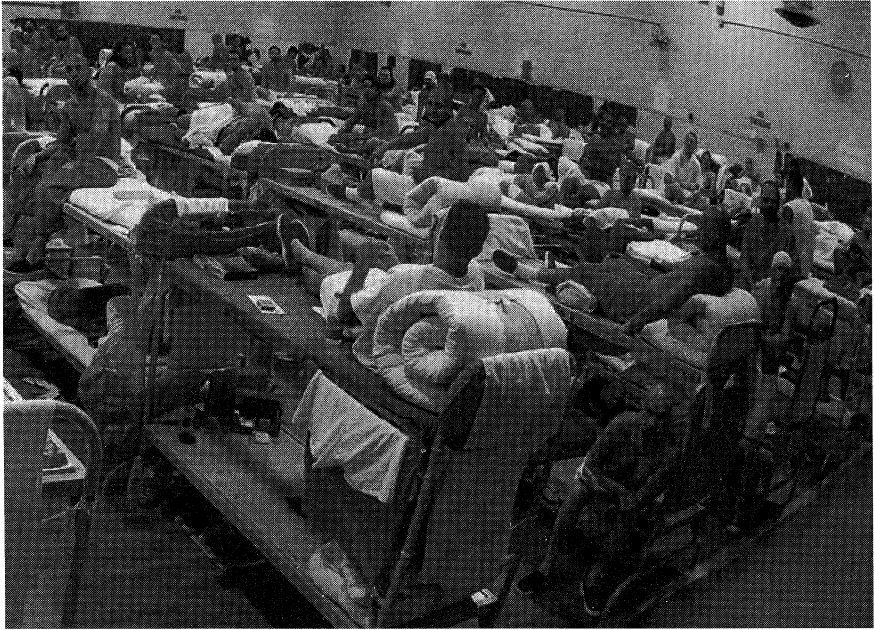
<sup>1</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011).

<sup>2</sup> Even in 1978, the crowding issue in *Hutto v. Finney* was not squarely before the Court when it affirmed lower court orders banning the long-term use of punitive isolation and granting plaintiffs' attorneys' fees. See 437 U.S. 678, 680 (1978). Likewise, in *Costello v. Wainwright*, the Court did not squarely address the Florida prison population cap in that case. Instead the Court held that only an ordinary district court, rather than a three-judge court, had jurisdiction to issue such an order. See 430 U.S. 325, 326 (1977). Thus, it could be said that the Supreme Court *never*, before *Plata*, affirmed a crowding order. Rather, the Court has been deeply suspicious of crowding claims. See *Rhodes v. Chapman*, 452 U.S. 337, 348–49 (1981); *Bell v. Wolfish*, 441 U.S. 520, 540–43 (1979).

<sup>3</sup> *Plata*, 131 S. Ct. at 1950–51 (Scalia, J., dissenting).

<sup>4</sup> *Id.* at 1928.

in mid-1993.<sup>5</sup> At its peak in 2007, California's prisoner total was over 173,000,<sup>6</sup> with prisoners who could not fit in cells packed instead into congregate spaces such as gyms. The picture below illustrates the result:



Source: California Department of Corrections and Rehabilitation<sup>7</sup>

As this Article is finished in November 2012, sixteen months after the *Platal Coleman* population order's effective date, the space pictured above is empty of beds and is being used, as intended, as a gym. Many newly convicted offenders who under prior rules would have come into the state system are instead serving their time in county jails. Parole violators are also being channeled to jails rather than prisons, and their numbers, altogether, have dropped significantly. Driven by these and other changes, together labeled "realignment," California's prison population is more than a quarter smaller than that 2007 peak; currently, the state houses about 125,000 prisoners, which puts the total population at about 147% of rated prison capacity; an

---

<sup>5</sup> CAL. DEPT OF CORR. AND REHAB., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT JUNE 30, 1993 (July 6, 1993), available at [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Monthly/TPOP1A/TPOP1Ad9306.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad9306.pdf).

<sup>6</sup> CAL. DEPT OF CORR. AND REHAB., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT AUGUST 31, 2007 (Sept. 5, 2007), available at [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Monthly/TPOP1A/TPOP1Ad0708.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad0708.pdf).

<sup>7</sup> CAL. DEPT OF CORR. AND REHAB., THE FUTURE OF CALIFORNIA CORRECTIONS: A BLUEPRINT TO SAVE BILLIONS OF DOLLARS, END FEDERAL COURT OVERSIGHT, AND IMPROVE THE PRISON SYSTEM 5 (Apr. 23, 2012), available at <http://www.cdcr.ca.gov/2012plan/docs/plan/complete.pdf> (last visited July 6, 2012) [hereinafter CDCR, BLUEPRINT].

additional 8,600 prisoners are housed out-of-state.<sup>8</sup> All this was prompted and enabled by the *Plata/Coleman* litigation, the population order the litigation produced, and the political processes that ensued. And the order (if it is not amended) requires still more prison population reduction in the near future: an additional decrease of nearly 15,000 — over 23,000 if the out-of-state prisoners are brought back home, as the Governor has declared they will be<sup>9</sup> — by the middle of 2013.

This Article explores pertinent features of the relevant legal and political ecosystem<sup>10</sup> in which these changes are taking place. Informed by court documents,<sup>11</sup> state reports and policy papers,<sup>12</sup> and interviews,<sup>13</sup> I trace the litigation and policy that led to and that have followed the Supreme Court's ruling affirming the *Plata/Coleman* population order. The result illustrates the complex interplay of institutional reform litigation and political outcomes and processes.

The Article proceeds in four parts. Part I sets out crucial background about how a 1996 anti-prisoners'-rights federal statute, the Prison Litigation Reform Act (PLRA), structures correctional civil rights litigation. Part II

<sup>8</sup> CAL. DEP'T OF CORR. AND REHAB., WEEKLY REPORT OF POPULATION AS OF MIDNIGHT OCTOBER 24, 2012 (Oct. 29, 2012), available at [http://www.cdcr.ca.gov/reports\\_research/offender\\_information\\_services\\_branch/WeeklyWed/TPOP1A/TPOP1Ad121024.pdf](http://www.cdcr.ca.gov/reports_research/offender_information_services_branch/WeeklyWed/TPOP1A/TPOP1Ad121024.pdf).

<sup>9</sup> See CDCR, BLUEPRINT, *supra* note 7, at 1, 28.

<sup>10</sup> I thank Nick Bagley for this metaphor.

<sup>11</sup> Each of the court documents referred to is cited individually, but all are available at the Civil Rights Litigation Clearinghouse, a repository of information about institutional reform cases. Documents related to the population issue are at *Plata v. Brown / Coleman v. Brown Three-Judge Court Proceedings*, <http://www.clearinghouse.net/detail.php?id=12280>. See also *Plata v. Brown*, 01-cv-01351 (N.D. Cal. Apr. 23, 1990), available at <http://www.clearinghouse.net/detail.php?id=589>; *Coleman v. Brown*, 90-cv-00520 (E.D. Cal. June 6, 1994), available at <http://www.clearinghouse.net/detail.php?id=573>.

<sup>12</sup> Again, these are individually cited, but many are collected at <http://www.CALRealignment.org/>.

<sup>13</sup> Even when not quoted or cited further, the telephone interviews I conducted were enormously helpful to the development of whatever insight this Article offers. Notes from all interviews are on file with the author. They included: Kimberly Hall Barlow, Partner, Jones & Mayer, Counsel for Law Enforcement Intervenor in *Plata* and *Coleman* (June 20, 2012); Michael Bien, Partner, Rosen, Bien, Galvan & Grunfeld, and Class Counsel in *Coleman* (May 2, 2012); Matthew Cate, Sec'y, Cal. Dep't of Corr. & Rehab. (July 17, 2012); Paul Comiskey, former lawyer for the Prisoners' Rights Union (June 12, 2012); Bill Crout, former Deputy Dir. & Acting Exec. Dir., Cal. Bd. of Corr. (June 11, 2012); Peter Eliasberg, Legal Dir., ACLU of S. Cal. (July 20, 2012); Ernie Galvan, Partner, Rosen, Bien, Galvan & Grunfeld, and Class Counsel in *Coleman* (May 1, 2012); John Hagar, attorney and former Assistant to the *Plata* Receiver (June 9, 2012); Thelton Henderson, U.S. Dist. Judge in *Plata* (June 12, 2012); Richard Herman, former lawyer for the Prisoners' Rights Union (June 6, 2012); Sandra Hutchens, Sheriff, Orange Cnty., Cal. (June 5, 2012); Clark Kelso, Receiver, Cal. Prison Med. Sys. (May 18, 2012); Barry Krisberg, Dir. of Research and Policy, Berkeley Law School Chief Justice Earl Warren Inst. on Law and Soc. Policy (May 30, 2012); Don Specter, Dir., Prison Law Office, and Class Counsel in *Plata* and *Coleman* (May 4, 2012); Dan Stormer, Partner, Hadsell, Stormer, Richardson & Renick (July 6, 2012); Bob Takeshta, Deputy Dir., Cal. Bd. of State and Cmty. Corr. (July 24, 2012); Nick Warner, Managing Partner, Warner & Pank (May 29, 2012); and Gary Wion, Deputy Dir., Cal. Corr. Standards Auth. (June 12, 2012). In addition, I also learned a great deal from the press accounts, interviews, and commentary collected at <http://californiacorrectionscrisis.blogspot.com>.

paints the relevant history of *Plata* and *Coleman*, in the district court and the Supreme Court, focusing on the interaction of court procedure and politics — describing, for example, how the litigation promoted a more explicit, open, and elaborate multiparty bargaining process over prison population and criminal justice policy; and how the focus during trial on public safety actually increased prisoners' rights advocates' effectiveness outside of litigation. It analyzes Governor Jerry Brown's "realignment" plan — the state's response to the *Plata/Coleman* population order, which shrinks the parole population and shortens parole-revocation sentence terms, moves some classes of prisoners from state to county custody, and encourages counties to consider nonincarcerative penalties for crime.

Part III looks at one of the key features of the environment in which realignment is being implemented: pre-PLRA population court orders. I demonstrate that contrary to Justice Scalia's rhetoric, population orders such as the *Plata/Coleman* order have been very common in correctional civil rights cases; in fact, some of these run-of-the-mill population orders are vital parts of the ongoing story of California prison reform. In California, the existing jail population orders, and the mindset that accompanies them, are encapsulated by two (equivalent) rules of thumb — "One prisoner, one bed," and "No floor sleepers." Currently covering about a third of California's jails and jail population, these orders have functioned for decades as county-specific bail and jail sentencing reform mechanisms.<sup>14</sup>

Part IV concludes by examining the prospects of a litigation-focused response to what I call the "hydra risk" — the very real possibility that *Plata* and *Coleman* could succeed at chopping the head off of unconstitutional conditions of prison confinement in California, only to cause fifty-eight counties to develop unconstitutional conditions of jail confinement. The one-prisoner-one-bed mindset substantially ameliorates, but does not eliminate, the hydra risk. Going forward, it will be a huge challenge for prisoners' rights advocates to find out what is going on in all the scattered county jails, much less to seek remedies for the problems that may be uncovered. Three types of litigation responses are likely: additional scrutiny of jails in ongoing statewide prison litigation; new jail litigation; and the revival of existing but more-or-less orphaned jail cases.

If California were a country, its prison and jail population would rank ninth in the world.<sup>15</sup> The partial reversal of its astronomical increase in prison population (from under 25,000 in 1980 to over 170,000 in 2006<sup>16</sup>) is

---

<sup>14</sup> See *infra* notes 237–240 and accompanying text.

<sup>15</sup> The total California incarcerated population is currently nearly 200,000; ninth-ranked South Africa incarcerates about 150,000 people. *Entire World — Prison Population Totals*, INTERNATIONAL CENTER FOR PRISON STUDIES, [http://www.prisonstudies.org/info/worldbrief/wpb\\_stats.php?area=all&category=wb\\_poptotal](http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poptotal) (last visited Sept. 29, 2012).

<sup>16</sup> See GEORGE HILL & PAIGE HARRISON, BUREAU OF JUSTICE STATISTICS, PRISONERS UNDER STATE OR FEDERAL JURISDICTION (Dec. 6, 2005), available at <http://bjs.ojp.usdoj.gov/content/data/CORPO02.csv>; CAL. DEPT OF CORR. AND REHAB., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT OCTOBER 31, 2006 (Nov. 2, 2006), available at <http://www.cdcr.ca>.

important in its own right. But California's experience of partially litigated reform also provides a concrete and therefore useful case study of some of the ways in which institutional reform litigation actually works. I have in other work lamented that decades of practical and scholarly experience with institutional reform litigation has not adequately analyzed its causes, its successes, and its failures. In particular, I have argued for lightening scholarly emphasis on judges in favor of closer examination of the multi-player politics of institutional reform litigation.<sup>17</sup> This Article is an effort to answer my own prior invitation.

The Article contributes, as well, to an additional scholarly project: that of paying closer attention to counties in criminal justice scholarship. Counties are widely acknowledged to be key American criminal justice players: it is, after all, county district attorneys who prosecute and county judges who sentence criminal offenders. Professors Franklin Zimring and Gordon Hawkins identify the resulting externality problem, describing state imprisonment as a "free lunch" for county political actors because counties do not bear the incarceration costs of the state prisoners they create.<sup>18</sup> Yet only a small amount of scholarly work has dug into county-level trends and processes to understand their dynamics and impact.<sup>19</sup> Realignment's explicit alteration of the county/state balance — shrinking the externalities to county sentencing — is drawing augmented attention, including this piece.<sup>20</sup>

But although the analysis is fine-gauge, the scene was set by macro trends in American criminal justice policy over the past four decades. The United States is, it has become commonplace to observe, in the midst of the largest criminal justice experiment ever undertaken. From 1930 to 1973, American incarceration rates stayed stable enough to prompt articles by dis-

---

gov/Reports\_Research/Offender\_Information\_Services\_Branch/Monthly/TPOPIA/TPOPIAd0610.pdf.

<sup>17</sup> Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2033, 2036 (1999) [hereinafter Schlanger, *Beyond the Hero Judge*]; see also Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 616–21 (2006) [hereinafter Schlanger, *Civil Rights Injunctions Over Time*]. Welcome contributions by others include, e.g., Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOC'Y REV. 731, 732 (2010); MONA LYNCH, *SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT* 174–207 (2010).

<sup>18</sup> FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 211 (1991).

<sup>19</sup> But see W. David Ball, *Tough on Crime (on the State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates — And Why It Should*, 28 GA. ST. U. L. REV. 987, 992–93 (2012) (providing citations to county-level studies of numerous aspects of the criminal justice system).

<sup>20</sup> Academic contributions include Anjuli Verma, *Institutional Crisis and Local Criminal Justice Work Groups* (May 22, 2012) (unpublished manuscript) (on file with author); Ball, *supra* note 19; Angela McCray et al., *Realigning the Revolving Door? An Analysis of California Counties' A.B. 109 Implementation Plans* (Jan. 2012) (unpublished draft), available at [http://www.law.stanford.edu/sites/default/files/child-page/183091/doc/slspublic/Realigning\\_the\\_Revolving\\_Door.pdf](http://www.law.stanford.edu/sites/default/files/child-page/183091/doc/slspublic/Realigning_the_Revolving_Door.pdf).

tinguished academics postulating a “stability of punishment hypothesis.”<sup>21</sup> Others predicted “the decline and likely fall of the ‘prison’ as that term is now understood.”<sup>22</sup> But the “war on crime” accomplished a sea change: beginning in 1973, and seemingly inexorably, the United States increased its incarceration rate year by year by year, until, at what now seems to have been the peak in 2009, our jails and prisons housed nearly 2.3 million people on any given day — a national incarceration rate of 7.4 per thousand.<sup>23</sup> We incarcerate more people (and particularly more nonwhite men) than any country in the world, at a rate that far outpaces our leading international competitors, Rwanda, Georgia, and Russia.<sup>24</sup> Perhaps the California story told here is part of a long-overdue pivot in national incarceration trends, a dialing back of this unfortunate piece of American exceptionalism.

## I. BACKGROUND: THE PRISON LITIGATION REFORM ACT

Prompted by increasing prisoner civil rights litigation (itself the result of skyrocketing prisoner populations)<sup>25</sup> and by accounts of criminal mayhem caused by court-ordered prison and jail population caps,<sup>26</sup> Congress enacted the lawsuit-limiting Prison Litigation Reform Act<sup>27</sup> (PLRA) in 1996, one of

<sup>21</sup> Alfred Blumstein & Soumyo Moitra, *An Analysis of the Time Series of the Imprisonment Rate in the States of the United States: A Further Test of the Stability of Punishment Hypothesis*, 70 J. CRIM. L. & CRIMINOLOGY 376 (1979); see generally Alfred Blumstein & Jacqueline Cohen, *A Theory of the Stability of Punishment*, 64 J. CRIM. L. & CRIMINOLOGY 198 (1973).

<sup>22</sup> Norval Morris, *Prison in Evolution*, 29 FED. PROBATION 20, 20 (1965). I was alerted to this essay by ROBERT PERKINSON, *TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE 3* (2010).

<sup>23</sup> LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATION IN THE UNITED STATES 2010 3, 6 (2011), available at <http://www.bjs.gov/content/pub/pdf/cpus10.pdf>.

<sup>24</sup> The International Centre for Prison Studies puts Rwanda at 5.3 per thousand, Georgia at 5.1, and Russia at 5.0 per thousand. INTERNATIONAL CENTRE FOR PRISON STUDIES, ENTIRE WORLD — PRISON POPULATION RATES PER 100,000 OF THE NATIONAL POPULATION, available at [http://www.prisonstudies.org/info/worldbrief/wpb\\_stats.php?area=all&category=wb\\_pop](http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_pop) rate (last visited June 19, 2012).

<sup>25</sup> See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1565 (2003) [hereinafter Schlanger, *Inmate Litigation*]; Anne Morrison Piehl & Margo Schlanger, *Determinants of Civil Rights Filings in Federal District Court by Jail and Prison Inmates*, 1 J. EMPIRICAL LEGAL STUD. 79, 84 (2004).

<sup>26</sup> Brief for the State of Louisiana et al. as Amici Curiae Supporting Appellants at 27–32, *Schwarzenegger v. Plata*, No. 09-1233 (U.S. 2011), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0037.pdf>. The lawsuit that looms the largest in the legislative history of the PLRA's population order provisions was *Harris v. City of Philadelphia*, No. 82-1847 (E.D. Pa. filed Apr. 1982); see generally *Harris v. Parnsley*, 654 F. Supp. 1042 (E.D. Pa. 1987), available at <http://www.clearinghouse.net/detail.php?id=231>. For a summary of the role this case played in the PLRA's passage, see Brief for the State of Louisiana et al., *supra*, and sources cited. The ACLU distinguished the *Harris* decree from the *Plata/Coleman* population order in its amicus brief. See Brief for the American Civil Liberties Union et al. as Amici Curiae at 7–8, *Schwarzenegger v. Plata*, No. 09-1233 (U.S. 2011), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0092.pdf>.

<sup>27</sup> Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321-66 (1996) (codified at 11 U.S.C. § 523 (2006); 18 U.S.C.

the few legislative results of Newt Gingrich's *Contract with America*.<sup>28</sup> I have previously described in depth the many ways in which the PLRA made old correctional court orders more difficult for plaintiffs' counsel to sustain and new ones more difficult to get.<sup>29</sup> Here, I examine population orders more particularly — what the PLRA labels “prisoner release order[s]” and defines as orders with “the purpose or effect of reducing or limiting the prison population, or that direct[ ] the release from or nonadmission of prisoners to a prison.”<sup>30</sup>

*Procedure:* The PLRA eliminates the authority of a single district judge to enter a population order. Instead, such an order can be entered only by a three-judge district court.<sup>31</sup> The three-judge court procedure emphasizes the seriousness of the subject matter, guards against the danger of a runaway judge, and comes with heightened (and speedier) appellate review: appeal from the final judgment of a three-judge court lies directly and as of right to the U.S. Supreme Court.<sup>32</sup> In addition, the PLRA greatly expands the access to population-order proceedings of a variety of criminal justice stakeholders, granting intervention rights to state and local officials, including legislators, prosecutors, and jail and prison officials.<sup>33</sup> This multiplication of parties makes settlement much more complex.

*Prerequisites:* The PLRA instructs the three-judge court not to enter a population order unless a prior, less intrusive order “has failed to remedy the deprivation of the Federal right sought to be remedied.”<sup>34</sup> In addition, the court must first find by clear and convincing evidence that “crowding is the primary cause of the violation of a Federal right,” and that “no other relief will remedy the violation of the Federal right.”<sup>35</sup> Courts are told, as well, to “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief,”<sup>36</sup> although they are offered no instructions about how to perform this balancing.

*Scope:* Once a three-judge court decides a population order is appropriate, the PLRA governs the scope of that order: for population orders as for all other prospective relief, entry of relief must be accompanied by a finding “that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means

---

§§ 3624, 3626 (2006); 28 U.S.C. §§ 1346, 1915, 1915A, 1932 (2006); 42 U.S.C. §§ 1997a–1997h (2006)).

<sup>28</sup> REPUBLICAN NAT'L COMM., *CONTRACT WITH AMERICA: THE BOLD PLAN BY REPRESENTATIVE NEWT GINGRICH, REPRESENTATIVE DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION* 53 (Ed Gillespie & Bob Schellhas eds., 1994).

<sup>29</sup> Schlanger, *Civil Rights Injunctions Over Time*, *supra* note 17, at 554.

<sup>30</sup> 18 U.S.C. § 3626(g)(4).

<sup>31</sup> *Id.* at § 3626(a)(3)(B).

<sup>32</sup> 28 U.S.C. § 1253.

<sup>33</sup> 18 U.S.C. § 3626(a)(3)(F).

<sup>34</sup> *Id.* at § 3626(a)(3)(A)(i).

<sup>35</sup> *Id.* at § 3626(a)(3)(E).

<sup>36</sup> *Id.* at § 3626(a)(1)(A).



necessary to correct the violation of the Federal right.”<sup>37</sup> These limits are consonant with ordinary remedial principles for litigated relief, but their application by the PLRA to prison and jail civil rights *settlements* was a notable innovation.<sup>38</sup>

*Termination:* The PLRA makes any court-enforceable, prospective relief in a prison or jail conditions case, including a population order, terminable on the motion of the defendant or intervenor. The motion to terminate can be made as soon as two years after relief is entered and must be granted unless the court makes written findings that the relief “remains necessary to correct a current and ongoing violation” of the plaintiffs’ federal rights, and is narrowly tailored.<sup>39</sup> The PLRA thus empowers defendants — and the broad group of criminal justice officials whom the Act allows to intervene as of right — to relitigate frequently the need for a population order, whether or not entered on consent. (The statutory right to seek termination can, however, be waived in advance in a settlement.<sup>40</sup>) It is important to note that even though this provision of the PLRA makes termination relatively easy to secure, defendants still might not seek it. First, as explored below, prison or jail officials may serve operational or political goals by remaining subject to court order. In addition, a defendant’s motion to terminate can open up a dormant case to more active litigation, when plaintiffs oppose the motion and begin discovery and other preparation for a termination hearing.<sup>41</sup> The PLRA’s hurdles to entry of *new* population orders — such as the one before the Supreme Court in *Brown v. Plata* — exacerbate these effects.

## II. PLATA AND COLEMAN

The case on appeal as *Brown v. Plata* in the Supreme Court combined one case most recently captioned *Coleman v. Brown* and another most recently known as *Plata v. Brown*.

---

<sup>37</sup> *Id.*

<sup>38</sup> See Schlanger, *Beyond the Hero Judge*, *supra* note 17, at 2010–11; Schlanger, *Civil Rights Injunctions Over Time*, *supra* note 17, at 594–95. See, e.g., *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 389 (1992) (explaining that injunctive settlements may extend well past what might permissibly be entered in litigated decrees); *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (“[A] federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.”).

<sup>39</sup> 18 U.S.C. § 3626(b)(3).

<sup>40</sup> See, e.g., *Settlement Agreement* at 17, *State of Conn. Office of Prot. and Advocacy for Persons with Disabilities v. Choinski*, No. 03-cv-01352 (D. Conn. Mar. 8, 2004), available at <http://www.clearinghouse.net/chDocs/public/PC-CT-0015-0001.pdf> (“The parties agree not to unilaterally seek to modify, extend, add to, terminate, or otherwise challenge this agreement, under the Prison Legal Reform Act or otherwise, for the duration of the three-year enforcement period.”).

<sup>41</sup> This has happened recently in *Pederson v. Cnty. of Plumas*, No. 89-cv-01659 (E.D. Cal. Dec. 4, 1989), available at <http://www.clearinghouse.net/detail.php?id=12199>. The case had been essentially dormant since 1992, but it may be reviving as a result of the sheriff’s effort to terminate a 1992 settlement setting a population cap of thirty-seven, in light of recent jail expansion. *Comiskey Interview*, *supra* note 13; *Stormer Interview*, *supra* note 13.

A. *Prior to the Supreme Court*

*Coleman* was filed in 1990 in the U.S. District Court for the Eastern District of California by a pro se prisoner, Ralph Coleman, who suffered from serious mental illness.<sup>42</sup> Housed at the Pelican Bay prison, where just one psychologist was assigned to treat any mental health needs of 3,500 prisoners, Coleman sought class action status for his suit and asked to be transferred to a facility where he would have access to a psychiatrist.<sup>43</sup> About a year later, Don Specter, the head of the Prison Law Office, a public interest organization then located just outside the gate of San Quentin prison, took on the case, along with other lawyers at his office, as well as Michael Bien of Rosen, Bien, Galvan & Grunfeld, and others. After a three-month trial, Chief Magistrate Judge John Moulds issued a scathing assessment of California's mental health provision and found that the system imposed cruel and unusual punishment, in violation of the Eighth Amendment,<sup>44</sup> the district judge, Lawrence Karlton, agreed in 1995.<sup>45</sup> The district court docket sheet indexing the extensive litigation over remediation in the seventeen years since has over 4,200 entries.<sup>46</sup>

*Plata* is newer and was at first less contentious. Dealing with medical care for state prisoners, it was filed in 2001 in the Northern District of California by the Prison Law Office on behalf of nine named male prisoners and a putative class of all prisoners then or in the future in the custody of the California Department of Corrections.<sup>47</sup> There was, initially, no trial: the State stipulated to the entry of injunctive relief in 2002, including the express, if opaque, concession that "the Court shall find that this Stipulation satisfies the requirements of 18 U.S.C. § 3626(a)(1)(A)"<sup>48</sup> — the provision of the PLRA that forbids federally enforceable prospective settlements absent a finding that the settlement's terms are narrowly tailored to "correct the

---

<sup>42</sup> *Coleman v. Wilson*, No. 90-cv-00520 (E.D. Cal. Dec. 4, 1989), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-9000.pdf>.

<sup>43</sup> Information about Ralph Coleman and his pro se request comes from Donald Specter, *Cruel and Unusual Punishment of the Mentally Ill in California's Prisons: A Case Study of a Class Action Suit*, 21 Soc. Just. 109, 110 (1994).

<sup>44</sup> Findings and Recommendations at 28–31, *Coleman v. Wilson*, No. 90-cv-00520 (E.D. Cal. June 6, 1994), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0035.pdf>.

<sup>45</sup> *Coleman v. Wilson*, 912 F. Supp. 1282, 1323 (E.D. Cal. 1995).

<sup>46</sup> The docket sheet is available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-9000.pdf>.

<sup>47</sup> Complaint at 2, *Plata v. Davis*, No. 01-cv-01351 (N.D. Cal. Apr. 5, 2001), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0018-0088.pdf>. Until 2009, prisoners confined at Pelican Bay State Prison were not part of the class because they were, instead, class members of a single-prison litigation, *Madrid v. Gomez*. See Stipulation and [Proposed] Order re Merger of Medical Health Care at Pelican Bay State Prison at 1–2, *Plata v. Schwarzenegger*, No. 01-cv-01351 (N.D. Cal. June 8, 2009), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0018-0083.pdf>.

<sup>48</sup> Stipulation for Injunctive Relief at 15, *Plata v. Davis*, No. 01-cv-01351 (N.D. Cal. June 13, 2002), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0018-0005.pdf>.

violation of [a] Federal right.” The State thus effectively, though cryptically, conceded in its stipulated injunction that the system’s level of care was constitutionally inadequate, evidencing systemic “deliberate indifference”<sup>49</sup> to the health of California’s prisoners. As District Judge Thelton Henderson explained three years later:

By all accounts, the California prison medical care system is broken beyond repair. The harm already done in this case to California’s prison inmate population could not be more grave, and the threat of future injury and death is virtually guaranteed in the absence of drastic action. . . . [I]t is an uncontested fact that, on average, an inmate in one of California’s prisons needlessly dies every six to seven days due to constitutional deficiencies in the [California Department of Corrections and Rehabilitation’s] medical delivery system. This statistic, awful as it is, barely provides a window into the waste of human life occurring behind California’s prison walls due to the gross failures of the medical delivery system.<sup>50</sup>

This Article is not the occasion to detail the remedial sagas of either *Plata* or *Coleman*, which would fill a small library.<sup>51</sup> (That is not to say that the case is incapable of judicial management;<sup>52</sup> in fact, in my view, the volume of court materials rather testifies to the care with which the litigation has proceeded, and the expertise the cases have marshaled in service of more humane incarceration.) My focus here is on the population issue. Both *Plata* and *Coleman* saw early resolution of the issue of liability. Early in both cases, the State either lost or conceded liability for systemic violations of the Eighth Amendment’s ban on cruel and unusual punishment. The result in each was an extensive set of injunctive provisions, specifying goals and methods of improving medical and mental health care. Subsequently in both, the district courts appointed remedial assisters with extensive authority — in *Coleman*, a special master (first, lawyer J. Michael Keating, and after Keating retired, lawyer Matthew Lopes) and in *Plata*, a receiver (first, public health expert Robert Sillen, and then law professor J. Clark Kelso). Both Lopes and Kelso, as well as the plaintiffs, were by 2006 reporting that increasing prison populations were frustrating their ability to effectuate com-

---

<sup>49</sup> For the deliberate indifference standard, see *Estelle v. Gamble*, 429 U.S. 97, 104–06 (1976).

<sup>50</sup> Findings of Fact and Conclusions of Law Re Appointment of Receiver at 1, *Plata v. Schwarzenegger*, No. 01-cv-01351 (N.D. Cal. Oct. 3, 2005), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0018-0007.pdf>.

<sup>51</sup> For nearly all the dozens of opinions, see the case pages at the Civil Rights Litigation Clearinghouse, *supra* note 11.

<sup>52</sup> For a guide to the judicial competence debate relating to institutional reform litigation, see, e.g., Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715, 729–42 (1992).

pliance with extant remedial court orders, or even with the underlying constitutional requirements.

In October 2006, after several unavailing efforts to legislate various solutions to overcrowding,<sup>53</sup> Governor Arnold Schwarzenegger issued a formal proclamation that the California prison system was facing a “State of Emergency” dangerous to prisoners, correctional staff, and the public;<sup>54</sup> state law required such a proclamation as a prerequisite to contracting with private or out-of-state facilities to house California prisoners.<sup>55</sup> The proclamation included paragraph after paragraph of description of the deleterious impact of crowding on health and security in California’s prisons. The lead lawyers in *Plata* and *Coleman* were, respectively, Don Specter, at the Prison Law Office, and Michael Bien, at the private civil rights firm Rosen, Bien, Galvan & Grunfeld.<sup>56</sup> Once they read the Governor’s 2006 State of Emergency document — which would obviously be admissible in court and would undercut any effort by the State to minimize the results of prison crowding — they decided it could tip the balance in their favor, notwithstanding the federal Prison Litigation Reform Act and its limits on the entry of new prison and jail population orders. If ever there was going to be a post-PLRA contested population cap, they agreed after much consultation, this would be it.<sup>57</sup> In both cases (and in the Americans with Disabilities Act prison class action, then captioned *Armstrong v. Schwarzenegger*, in which the same lawyers served as class counsel), they filed a motion seeking a population order.<sup>58</sup> Over the objection of the State, and after a joint motion hearing, Judge Karlton and Judge Henderson decided that the plaintiffs had made the showing required to convene a three-judge court; they each granted the motion.<sup>59</sup> (In *Armstrong*, Judge Claudia Wilken denied the motion with-

<sup>53</sup> See, e.g., A.B. 2902, California Legislature, 2005–2006 Regular Session (2006); S.B. 901, California Legislature, 2005–2006 Regular Session (2005); A.B. 96, California Legislature, 2005–2006 Regular Session (2005); A.B. 1762, California Legislature, 2005–2006 Regular Session (2005).

<sup>54</sup> Arnold Schwarzenegger, Governor of Cal., Prison Overcrowding State of Emergency Proclamation (Oct. 4, 2006), available at <http://gov.ca.gov/news.php?id=4278> (last visited May 4, 2012).

<sup>55</sup> See CAL. GOV’T CODE tit. 2, div. 1, ch. 7, §§ 8550, 8625, 8645, 8646(c) (West 2009).

<sup>56</sup> Interview with Michael Bien, *supra* note 13.

<sup>57</sup> Interview with Michael Bien, *supra* note 13; Interview with Ernie Galvan, *supra* note 13.

<sup>58</sup> Motion to Convene a Three Judge Panel, *Armstrong v. Davis*, No. 94-cv-02307 (N.D. Cal. Nov. 15, 2006), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0001-9000.pdf>; Motion to Convene a Three Judge Panel, *Plata v. Brown*, No. 01-cv-01351 (N.D. Cal. Nov. 13, 2006), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0018-9000.pdf>; Motion to Convene a Three Judge Panel, *Coleman v. Brown*, No. 90-cv-00520 (E.D. Cal. Nov. 13, 2006), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-9000.pdf>.

<sup>59</sup> Order Granting Plaintiffs’ Motion to Convene Three-Judge Court, *Plata v. Schwarzenegger*, No. 01-cv-01351 (N.D. Cal. July 23, 2007), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0007.pdf>; Order, *Coleman v. Schwarzenegger*, No. 90-cv-00520 (E.D. Cal. July 23, 2007), available at [http://chadmin.clearinghouse.net/chDocs/not\\_public/PC-CA-0002-0008.pdf](http://chadmin.clearinghouse.net/chDocs/not_public/PC-CA-0002-0008.pdf).

out prejudice to its later resubmission.<sup>60</sup> This was apparently the very first (and, so far, the only) population-order three-judge panel convened over governmental objection since the PLRA's enactment.<sup>61</sup>

The next move was up to the Ninth Circuit's then-Chief Judge, Mary Schroeder. Three-judge district courts are usually staffed with the district judge for the relevant underlying case, another district judge, and a court of appeals judge, with the latter two chosen essentially at random. But this matter had *two* underlying district court cases, and Chief Judge Schroeder decided, accordingly, to put both Judge Henderson and Judge Karlton on the three-judge court. The remaining slot was apparently assigned "on the wheel" (that is, at random) to Judge Stephen Reinhardt,<sup>62</sup> well known as one of the most liberal members of the federal bench.<sup>63</sup> Given the entire federal judiciary from which to pick, it would have been hard to populate a court more likely to be favorable to prisoner plaintiffs than the *Plata/Coleman* three-judge court. The State appealed to the Ninth Circuit to reverse the district judges' orders convening the three-judge court, but those appeals were soon dismissed as interlocutory.<sup>64</sup>

After various motions and discovery, the three-judge court began to try to move the matter towards settlement. In November 2007, the panel appointed retired California Court of Appeal Justice Elwood Lui as settlement referee and current California Court of Appeal Justice Peter Siggins as a consultant and advisor to the settlement referee.<sup>65</sup> After six months of work, Justices Lui and Siggins submitted a settlement proposal; it would have included, if adopted, an immediate population goal of 158% of design capacity (132,500), and three strategies for additional population reduction: local di-

---

<sup>60</sup> See Amended Minute Order, *Armstrong v. Schwarzenegger*, No. 94-cv-02307 (N.D. Cal. Nov. 15, 2007), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0001-0022.pdf>.

<sup>61</sup> For information on all the post-PLRA population orders of which I am aware, see <http://bit.ly/postPLRAjail>, and <http://bit.ly/postPLRAprison>.

<sup>62</sup> See Order Designating United States District Court Composed of Three Judges Pursuant to Section 2284, Title 28 United States Code, *Coleman v. Schwarzenegger*, No. 90-cv-00520, No. 01-cv-01351 (E.D. Cal., N.D. Cal. July 26, 2007), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0008.pdf>.

<sup>63</sup> See, e.g., Debra Cassens Weiss, *9th Circuit Judge Reinhardt Unfazed by Supreme Court Criticism*, ABA JOURNAL (July 19, 2011), [http://www.abajournal.com/news/article/9th\\_circuit\\_judge\\_reinhardt\\_unfazed\\_by\\_supreme\\_court\\_criticism/](http://www.abajournal.com/news/article/9th_circuit_judge_reinhardt_unfazed_by_supreme_court_criticism/) ("viewed as possibly the country's most liberal jurist").

<sup>64</sup> Order at 1, *Coleman v. Schwarzenegger*, No. 90-cv-00529, No. 01-cv-01351 (9th Cir. Sept. 11, 2007), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0014.pdf>.

<sup>65</sup> See Order Appointing Settlement Referee and Consultant, *Coleman v. Schwarzenegger*, No. 90-cv-00529, No. 01-cv-01351 (E.D. Cal., N.D. Cal. Nov. 1, 2007), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0047.pdf>. For a biography of Justice Siggins, see *Peter J. Siggins*, CALIFORNIA COURTS, <http://www.courts.ca.gov/7660.htm> (last visited Oct. 26, 2012). For information on former Justice Lui, see *California Appellate Court Legacy Project — Video Interview Transcript: Justice Elwood Lui* (2007), available at [http://www.courts.ca.gov/documents/Elwood\\_Lui\\_6132.pdf](http://www.courts.ca.gov/documents/Elwood_Lui_6132.pdf). Justice Lui was the managing partner of the law firm Jones Day, which had been a part of the plaintiffs' counsel team. Justice Siggins had previously been the lead lawyer for the State's defense of correctional law cases.

version for short-term sentenced convicts and those facing probation revocation; alternative sanctions for lower-level parole violators; and an augmentation of good-time credits to include programming credits.<sup>66</sup> The final population goal was to be subject to development by an advisory body, but if set lower than 129,850 or greater than 135,150, the State and the plaintiffs, respectively, were to be allowed to withdraw from the settlement. It seems that both the State and the plaintiffs were prepared to sign on to something close to this proposal, but that other, intervening parties — most publicly, the Republican legislators — objected.<sup>67</sup>

Even though the settlement discussions failed, participants attribute to them a vital role in the eventual population planning. There were dozens of participants, divided into four working groups that met at great length and repeatedly over months.<sup>68</sup> Plaintiffs' counsel Ernie Galvan calls the negotiations "kind of a dress rehearsal" for the eventual framing and passage of Assembly Bill 109, the state statute that eventually enacted realignment. He explains that in the settlement negotiations, "everyone got a chance to vent, and to get their dealbreakers out on the table"; without these discussions, he says, one constituency or another would later have killed realignment. Corrections Secretary Matt Cate agrees that the settlement negotiations were important because they "got policymakers from many different stakeholder groups, including law enforcement, to begin thinking about evidence-based solutions to large correctional and public safety problems."<sup>69</sup> The settlement negotiations, Cate says, provided "the urgency necessary for law enforcement groups to begin thinking about safe ways to reduce incarceration." (Cate emphasizes, however, that realignment discussions, which started "in the Governor-Elect's offices in late 2010," were themselves wide-ranging, intensive, and time-consuming.)

In fact, it is worth pausing to think about this episode a bit more analytically. Notwithstanding the romanticism of rights and the preeminence in ordinary discourse of judges and their lawgiving function, litigation is, first and foremost, an occasion for negotiation. Mark Galanter has cleverly captured this truth with the neologism "litigotiation" — "the strategic pursuit of a settlement through mobilizing the court process."<sup>70</sup> Ordinarily, litigation gives extra negotiation points to the plaintiff; otherwise, why bother

---

<sup>66</sup> Status Report and Draft Proposal by Settlement Referee at 7–9, *Coleman v. Schwarzenegger*, No. 90-cv-00529, No. 01-cv-01351 (E.D. Cal., N.D. Cal. May 27, 2008), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0024.pdf>.

<sup>67</sup> See LEGISLATOR INTERVENORS' POSITION STATEMENT RE: DRAFT SETTLEMENT REFEREE PROPOSAL (June 2, 2009), available at [http://cssrc.us/pubs/080626\\_Leg\\_Intervenors\\_State\\_ment.pdf](http://cssrc.us/pubs/080626_Leg_Intervenors_State_ment.pdf).

<sup>68</sup> Interview with Ernie Galvan, *supra* note 13.

<sup>69</sup> Interview with Matthew Cate, *supra* note 13.

<sup>70</sup> Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984). See also Ralph Cavanagh & Austin Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371, 405 (1980) ("Extended impact litigation does not displace negotiation and compromise but is frequently an essential precondition to it.").

bringing the case? (Unless, that is, litigation is used as a publicity/organizing tool.<sup>71</sup>) In institutional reform cases, the distance between the plaintiff class and class counsel can mean that it is the advocates serving as the cases' lawyers who gain what bargaining chips there are to be gained.<sup>72</sup> Plaintiffs and/or their counsel increase their agenda-setting influence;<sup>73</sup> they gain the ability to receive information and to have their questions answered and their arguments taken seriously; they augment their capacity to make news and garner publicity. And of course, depending on the law and the judge, they may gain access to additional threats of bad consequences if they are not satisfied. All this was important and influential in *Plata* and *Coleman*. But what is more unusual, because it stemmed from the PLRA's wide-open intervention rules, was the way that settlement discussions created an extraordinarily open and explicit negotiation among the many different stakeholders. Added to the State and the prisoners' counsel was not just the correctional officers' union (tremendously influential in California<sup>74</sup>), but also the district attorneys, Republican legislators, sheriffs and police chiefs, probation officers, and counties.<sup>75</sup> All of these groups have influence in state politics — but legislative negotiations are rarely as time-consuming, as open (with respect to participants), or as structured (with respect to process) as the settlement negotiations in *Plata/Coleman*. And given that it is always easier to kill a bill than to pass one, it may be that only this kind of search for buy-in could have laid the groundwork for the eventual realignment plan.

In any event, settlement efforts failed and the matter proceeded to trial on November 18, 2008.<sup>76</sup> The transcript reflects a sharp focus on the public safety aspects of the case, in response to the PLRA's command that courts "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief."<sup>77</sup> The plaintiffs' case was built with expert testimony that focused on risk classification — evidence that many of those released from prison posed low recidivism and public safety threats — and on the criminogenic influence of short-term prison stays for technical parole violators who cycled in and out of California's prisons. Plaintiffs' counsel Michael Bien explains that for him, as for

---

<sup>71</sup> See, e.g., Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 955 (2011).

<sup>72</sup> I explore the role of plaintiffs' lawyers in prison and jail litigation in depth in Schlanger, *Beyond the Hero Judge*, *supra* note 17, at 2015–30.

<sup>73</sup> On agenda setting, see generally JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (2d ed. 1995); Mark Kessler, *Legal Mobilization for Social Reform: Power and the Politics of Agenda Setting*, 24 LAW & SOC'Y REV. 121 (1990).

<sup>74</sup> See, e.g., JOSHUA PAGE, *THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA* 44–80 (2011).

<sup>75</sup> Interview with Michael Bien, *supra* note 13; Interview with Ernie Galvan, *supra* note 13.

<sup>76</sup> Minute Entry at 4, *Coleman v. Schwarzenegger*, No. 90-cv-00529, No. 01-cv-01351 (E.D. Cal., N.D. Cal. Feb. 9, 2009), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0029.pdf>.

<sup>77</sup> 18 U.S.C. § 3626(a)(1)(A) (2006).

most prisoners' rights advocates, public safety had not previously been an explicit part of constitutional-conditions cases. "We were forced by the PLRA to focus on public safety, and that was a blessing," he told me. "It makes us far more effective as advocates *out* of court, if we can say that crowding is hurting public safety rather than just violating the rights of prisoners."<sup>78</sup>

On February 9, 2009, the three-judge court issued a "tentative ruling," informing the parties that it was inclined to hold that all the prerequisites for a population order had been satisfied, and to issue such an order: "Although the evidence may be less than perfectly clear, it appears to the Court that in order to alleviate the constitutional violations California's inmate population must be reduced to at most 120% to 145% of design capacity, with some institutions or clinical programs at or below 100%."<sup>79</sup> The court opined further that California *could*, if it chose, achieve this kind of population reduction without an adverse effect on public safety.<sup>80</sup> The court emphasized that that numerous private and public stakeholders — the CDCR's "Expert Panel on Adult Offender Recidivism Reduction Programming," the governor, the legislature — had proposed or supported reform measures involving changes to earned credits and parole that would decrease prison population by tens of thousands of state prisoners. "We cannot believe that such support would exist if the adoption of such measures would adversely affect public safety. We thus infer from the universal official support for these measures that they are not likely to result in adverse public safety consequences."<sup>81</sup> Rather than issuing a population order, however, the court invited the parties to restart settlement negotiations, perhaps facilitated by the same settlement referees as before.<sup>82</sup>

The State, however, declined to negotiate further,<sup>83</sup> and on August 4, 2009, the three-judge court finally answered the multi-billion-dollar question — What was the population goal going to be? — in its ruling for the plaintiffs. After 182 exhaustive pages of findings of fact and conclusions of law,

---

<sup>78</sup> Interview with Michael Bien, *supra* note 13.

<sup>79</sup> Tentative Ruling at 4, *Coleman v. Schwarzenegger*, No. 90-cv-00529, No. 01-cv-01351 (E.D. Cal., N.D. Cal. Feb. 9, 2009), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0029.pdf>.

<sup>80</sup> *Id.*; see also 18 U.S.C. § 3626(a)(1)(A) (2006).

<sup>81</sup> Tentative Ruling at 4, *Coleman v. Schwarzenegger*, No. 90-cv-00529, No. 01-cv-01351 (E.D. Cal., N.D. Cal. Feb. 9, 2009), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0029.pdf>, referring to CAL. DEP'T OF CORR. AND REHAB., EXPERT PANEL ON ADULT OFFENDER AND RECIDIVISM REDUCTION PROGRAMMING, REPORT TO THE CALIFORNIA STATE LEGISLATURE: A ROADMAP FOR EFFECTIVE OFFENDER PROGRAMMING IN CALIFORNIA 93 (June 29, 2009), available at [http://www.cdcr.ca.gov/news/Press\\_Release\\_Archive/2007\\_Press\\_Releases/docs/ExpertPanelRpt.pdf](http://www.cdcr.ca.gov/news/Press_Release_Archive/2007_Press_Releases/docs/ExpertPanelRpt.pdf).

<sup>82</sup> Tentative Ruling at 4, *Coleman v. Schwarzenegger*, No. 90-cv-00529, No. 01-cv-01351 (E.D. Cal., N.D. Cal. Feb. 9, 2009), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0029.pdf>.

<sup>83</sup> Defendants' Response to Tentative Ruling at 2, *Coleman v. Schwarzenegger*, No. 90-cv-00529, No. 01-cv-01351 (E.D. Cal., N.D. Cal. Feb. 25, 2009), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0036.pdf>.



the court instructed the State to present a plan within forty-five days “that will in no more than two years reduce the population of the [California Department of Corrections and Rehabilitation’s] adult institutions to 137.5% of their combined design capacity.”<sup>84</sup> After the three-judge court denied a motion to stay that order,<sup>85</sup> California submitted a population plan that provided, instead, for a reduction of population to 166% of design capacity. The three-judge court promptly rejected this attempt, scolding the State but declining to impose sanctions.<sup>86</sup> The State’s population reduction plan finally followed on November 12. The State referenced numerous ideas for reducing prison population, ranging from improvement in probation supervision that would decrease probation revocation to diversion programs and nonincarcerative sanctions, to out-of-state contracts — but the document did not commit to any of the proposals.<sup>87</sup>

Rather than adopting any of the ideas in a court order, on January 10, 2010, the court simply ordered the State to reach a shrinking set of population benchmarks:

- 167% of design capacity within six months of the order’s effective date
- 155% within twelve months
- 147% within eighteen months
- 137.5% within twenty-four months<sup>88</sup>

Michael Bien, lead class counsel in *Coleman*, recalls that to get an order that would survive on appeal, he felt that during his closing argument he “had to convince the three-judge court *not* to issue what they thought was a strong and appropriate order. I got up there to argue that the political leaders had to make the decisions.”<sup>89</sup> In the end, the three-judge court agreed, and indeed went to extraordinary lengths to avoid dictating to the State how it should implement the population order. Presumably this was in part because of the Supreme Court’s rather vehement insistence (in a prior prison case from the Ninth Circuit, no less) that states must be given a first chance to propose a remedy in institutional reform litigation against them, both because they are

<sup>84</sup> Opinion and Order at 183, *Coleman v. Schwarzenegger*, No. 90-cv-00529, No. 01-cv-01351 (E.D. Cal., N.D. Cal. Aug. 4, 2009), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0031.pdf>.

<sup>85</sup> Order Denying Motion to Stay August 4, 2009 Order at 3, *Coleman v. Schwarzenegger*, No. 90-cv-00529, No. 01-cv-01351 (E.D. Cal., N.D. Cal. Aug. 4, 2009), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0052.pdf>.

<sup>86</sup> Order Rejecting Defendants’ Population Reeducation Plan and Directing the Submission of a Plan that Complies with the August 4, 2009 Opinion and Order at 2, *Coleman v. Schwarzenegger*, No. 90-cv-00529, No. 01-cv-01351 (E.D. Cal., N.D. Cal. Oct. 21, 2009), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0038.pdf>.

<sup>87</sup> Defendants’ Response to Three-Judge Court’s October 21, 2009 Order at 2, *Coleman v. Schwarzenegger*, No. 90-cv-00529, No. 01-cv-01351 (E.D. Cal., N.D. Cal. Nov. 12, 2009), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0037.pdf>.

<sup>88</sup> Order to Reduce Prison Population at 4, *Coleman v. Schwarzenegger*, No. 90-cv-00529, No. 01-cv-01351 (E.D. Cal., N.D. Cal. Jan. 12, 2010), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0035.pdf>.

<sup>89</sup> Interview with Michael Bien, *supra* note 13.

more expert than either the court or the plaintiffs, and because they are democratically accountable.<sup>90</sup> The PLRA's requirement that ordered relief be "the least intrusive means necessary to correct the violation" also counsels strongly in favor of leaving states free to declare their own remedies, where possible. In addition, it is hard to imagine the Supreme Court upholding an order whose details the Justices could pick apart and second-guess, rather than one with only two crucial terms (137.5% of rated capacity in two years). And finally, the judges must have wanted an approach that the State and counties could live with; one that the governor could defend and advocate in the legislature; one that might, accordingly, work. As Judge Henderson describes his thinking, "It's clear to me — although I can't speak for Judges Karlton and Reinhardt — that realignment is a political deal, in which the Governor went to the fifty-eight counties and got something that every county could live with."<sup>91</sup>

### B. In the Supreme Court

Simultaneously to issuing the ruling, the three-judge court stayed its own order pending Supreme Court review.<sup>92</sup> This delay did not entirely halt progress in the case, however. For one thing, nonpopulation matters continued apace in both *Plata* and *Coleman*.<sup>93</sup> But even with respect to the population order, the parties seem not to have felt all that much suspense. Rather, as in the district court (although with less certainty), they seem to have expected that the Supreme Court would affirm at least the imposition of a population order, perhaps raising the goal somewhat. As in most recent cases with sharp ideological stakes, Justice Kennedy was seen to be the swing Justice — but in this area more than many others, he leans left. A Californian to his core,<sup>94</sup> and with significant ties to many of the *Plata/Coleman* participants,<sup>95</sup> Justice Kennedy was well known to *Plata* and *Coleman*'s parties, and he has, over the years, taken a notably reformist tack in speeches

---

<sup>90</sup> See *Lewis v. Casey*, 518 U.S. 343, 362 (1996) (reversing the Ninth Circuit and striking down a court order in part because the state was not given the first chance to design a remedy).

<sup>91</sup> Interview with Thelton Henderson, *supra* note 13.

<sup>92</sup> Order to Reduce Prison Population at 6, *Coleman v. Schwarzenegger*, No. 90-cv-00529, No. 01-cv-01351 (E.D. Cal., N.D. Cal. Jan. 12, 2010), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0018-0079.pdf>.

<sup>93</sup> *Coleman v. Brown*, No. 90-cv-00520 (E.D. Cal. Apr. 23, 1990), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-9000.pdf>; *Plata v. Brown*, No. 01-cv-1351 (N.D. Cal. Apr. 5, 2001), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0018-9000.pdf>.

<sup>94</sup> A recent profile describes Justice Kennedy as "the epitome of 'a Sacramento person'" (quoting Joan Didion, who has known him since childhood) — committed to "ad hoc" "problem solving" by "individual power brokers who could find the middle ground." Massimo Calabresi & David Von Drehle, *What Will Justice Kennedy Do?*, TIME, June 18, 2012, at 32.

<sup>95</sup> To cite just one example, *Plata*'s receiver, Clark Kelso, was first Justice Kennedy's law clerk on the Ninth Circuit, and then his colleague at the McGeorge School of Law. See *Biography of J. Clark Kelso*, MCGEORGE SCHOOL OF LAW, [http://www.mcgeorge.edu/J\\_Clark\\_Kelso.htm?display=FullBio](http://www.mcgeorge.edu/J_Clark_Kelso.htm?display=FullBio) (last visited Oct. 12, 2012).

on prison conditions. In a major address to the American Bar Association, for example, Justice Kennedy called the American incarceration experiment a failure: “Our resources are misspent, our punishments too severe, our sentences too long.”<sup>96</sup> (State officials will not discuss their thinking on this topic with me, but presumably they declined to settle, notwithstanding the faintness of their hope for success in the Supreme Court, because they sought the political cover of a court order.)

Oral argument in the Supreme Court, on November 30, 2010 — a mere month after the election of Governor Jerry Brown — confirmed participants’ sense of the Court; Justice Kennedy several times telegraphed his inclination to affirm, thus offering the State little prospect of an outright reversal. There were, however, hints in the argument that the Court might revise the population order to set a 145% goal and a timeframe of five years.<sup>97</sup> In any event, however, the Supreme Court’s May 2011 five-to-four ruling affirmed the three-judge court’s population order in its entirety. In an opinion by, sure enough, Justice Kennedy, the Court held: “The State’s desire to avoid a population limit, justified as according respect to state authority, creates a certain and unacceptable risk of continuing violations of the rights of sick and mentally ill prisoners, with the result that many more will die or needlessly suffer. The Constitution does not permit this wrong.”<sup>98</sup> The Court emphasized that the order it affirmed might well never lead to the actual early release of any prisoner, since it allows “the State to comply with the population limit by transferring prisoners to county facilities or facilities in other States, or by constructing new facilities to raise the prisons’ design capacity. And the three-judge court’s order does not bar the State from undertaking any other remedial efforts.”<sup>99</sup>

Although it affirmed the three-judge district court in all respects, the Court also emphasized that “[t]he three-judge court, however, retains the authority, and the responsibility, to make further amendments to the existing order or any modified decree it may enter as warranted by the exercise of its sound discretion.”<sup>100</sup> In fact, the Court manifested some skepticism toward the order’s two-year schedule (“The State may wish to move for modifica-

---

<sup>96</sup> See *Justice Criticizes Lengthy Sentences*, N.Y. TIMES, Aug. 10, 2003, <http://www.ny-times.com/2003/08/10/us/justice-criticizes-lengthy-sentences.html>.

<sup>97</sup> See, e.g., Transcript of Oral Argument at 59, *Schwarzenegger v. Plata*, 130 S. Ct. 1140 (2011) (No. 09-1233), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/09-1233.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1233.pdf) (Justice Anthony Kennedy: “I think that certainly the Prison Litigation Reform Act means that you have to, if you — if there is going to be a release order, it must be releasing the minimum amount. . . . There was substantial expert opinion that 145 — 145 percent would be sufficient. Isn’t — doesn’t the evidence indicate to you that at least 145 ought to be the beginning point, not 137.5?”). *Plata* Receiver Clark Kelso confirms that after the oral argument, “the only question was, would it be a straight affirmance, or would there be a modification of either the time frame for compliance or the percentage figure.” Interview with Clark Kelso, *supra* note 13.

<sup>98</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1941 (2011).

<sup>99</sup> *Id.* at 1937.

<sup>100</sup> *Id.* at 1946.

tion of the three-judge court's order to extend the deadline for the required reduction to five years from the entry of the judgment of this Court, the deadline proposed in the State's first population reduction plan."<sup>101</sup>), and devoted considerable space to cautioning the three-judge court:

[T]he three-judge court must remain open to a showing or demonstration by either party that the injunction should be altered to ensure that the rights and interests of the parties are given all due and necessary protection.

Proper respect for the State and for its governmental processes require that the three-judge court exercise its jurisdiction to accord the State considerable latitude to find mechanisms and make plans to correct the violations in a prompt and effective way consistent with public safety. . . . [T]he three-judge court must give due deference to informed opinions as to what public safety requires, including the considered determinations of state officials regarding the time in which a reduction in the prison population can be achieved consistent with public safety. An extension of time may allow the State to consider changing political, economic, and other circumstances and to take advantage of opportunities for more effective remedies that arise as the Special Master, the Receiver, the prison system, and the three-judge court itself evaluate the progress being made to correct unconstitutional conditions.<sup>102</sup>

However, Justice Kennedy wrote, these musings

are not intended to cast doubt on the validity of the basic premise of the existing order. The medical and mental health care provided by California's prisons falls below the standard of decency that inheres in the Eighth Amendment. This extensive and ongoing constitutional violation requires a remedy, and a remedy will not be achieved without a reduction in overcrowding. The relief ordered by the three-judge court is required by the Constitution and was authorized by Congress in the PLRA. The State shall implement the order without further delay.<sup>103</sup>

The dissents were strident. Ignoring the flexible order actually on appeal and characterizing the three-judge court's ruling as "an order requiring California to release the staggering number of 46,000 convicted criminals," Justice Scalia (joined only by Justice Thomas) described it as "perhaps the most radical injunction issued by a court in our Nation's history."<sup>104</sup> A contrary outcome, he said, was "so clearly indicated by tradition and common

---

<sup>101</sup> *Id.* at 1947.

<sup>102</sup> *Id.* at 1946.

<sup>103</sup> *Id.* at 1947.

<sup>104</sup> *Id.* at 1950 (Scalia, J., dissenting).

sense” as to compel “every effort to read the law in such a way as to avoid that outrageous result.”<sup>105</sup> Moreover, he described the “proceedings that led to this result” as “a judicial travesty.”<sup>106</sup> Both Justice Scalia’s dissent and a separate one by Justice Alito (joined by Chief Justice Roberts) focused on the issue of crime.<sup>107</sup> Justice Scalia argued that because the order’s impact on crime could not be evaluated through judicial factfinding, it constituted illegitimate judicial policymaking.<sup>108</sup> Justice Alito, by contrast, disagreed not with the idea of judicial factfinding about crime, but with the facts the three-judge court found; he asserted that the order would increase crime by allowing criminal offenders more time on the streets.<sup>109</sup>

The Supreme Court’s opinion was dated May 23, 2011, but the judgment was not formally transmitted to the three-judge district court until a month later. So that court declared its now-ratified population order effective as of June 27, 2011 — giving California until the end of 2013 to reach a population of 137.5% of design capacity.<sup>110</sup>

### C. *After the Supreme Court: Realignment*

California did not wait for the Supreme Court’s May ruling to move towards population reform. Policy discussions about how to address, simultaneously, California’s deep deficit and the three-judge court order began in the Governor-Elect’s offices immediately after the November 2010 election. In meeting after meeting, the Governor’s staff, corrections officials, key legislators, the district attorneys, the sheriffs, and the correctional officers’ union — all the stakeholders except for prisoners and their advocates — worked through how to lower prison population, spend less money, and avoid wholesale prisoner releases.<sup>111</sup> The result was a legislative proposal introduced as part of a massive budget package just seven days after Governor Brown was sworn in. The legislature began to consider Assembly Bill 109, entitled “Criminal justice alignment,” on January 10, 2011.<sup>112</sup> Governor Jerry Brown signed the bill into law in April 2011, six weeks before the Supreme Court’s opinion issued. A.B. 109 was drafted by the Governor’s staff and the Department of Corrections;<sup>113</sup> it was kept out of legislative committees and no floor amendments were made.<sup>114</sup> The votes were nearly

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1951.

<sup>107</sup> *Id.* at 1957; *id.* at 1959, 1965–68 (Alito, J., dissenting).

<sup>108</sup> *Id.* at 1953 (Scalia, J., dissenting).

<sup>109</sup> *Id.* at 1960–61 (Alito, J., dissenting).

<sup>110</sup> Order Requiring Interim Reports at 2, *Coleman v. Brown*, No. 90-cv-00520, No. 01-cv-01351 (E.D. Cal., N.D. Cal. June 30, 2011), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0059.pdf>.

<sup>111</sup> Interview with Matthew Cate, *supra* note 13.

<sup>112</sup> The legislative history for A.B. 109 is available at <http://legiscan.com/gaits/view/223265>.

<sup>113</sup> Interview with Matthew Cate, *supra* note 13.

<sup>114</sup> Interview with Nick Warner, *supra* note 13.

straight party line; the bill passed by a vote of 24 to 16 in the Senate, and 51 to 27 in the Assembly.<sup>115</sup>

Enacting Governor Brown's "realignment" vision, A.B. 109 (slightly amended by A.B. 117, which was considered in June 2011, and signed just three days after the three-judge court made the *Plata/Coleman* population order effective<sup>116</sup>) addresses where prisoners serve their time; who is responsible for supervising them in the community and deciding when to recommit them for parole violations; and how much time parole violators are likely to serve:

- (1) *The "non-non-nons"*: Realignment moves the imprisonment for certain felons (those convicted of nonserious, nonviolent, and non-sex crimes, usually called "non-non-nons," or "three-nons") to county jails, rather than state prisons.<sup>117</sup> And now that the non-non-nons are county prisoners, sheriffs have authority to release them if necessary.<sup>118</sup>
- (2) *Community supervision*: Realignment shifts primary responsibility from the state to the counties for post-release supervision; counties will now be responsible for monitoring non-non-non felons on parole and supervised release,<sup>119</sup> although the state remains responsible for other, more serious offenders. In addition, for both county and state supervision, realignment has reduced from one year to six months the period after which supervised persons are considered for early discharge.<sup>120</sup> And for state parolees under county supervision, it requires an end to supervision after one year (instead of three years), if the person remains free of violations that result in a custodial sanction.<sup>121</sup>
- (3) *Parole-revocation proceedings and terms*: Beginning in 2013, realignment sets parole-revocation proceedings to be handled by Superior Court-affiliated hearing officers rather than the state Board

---

<sup>115</sup> For the roll call votes, see <http://legiscan.com/gaits/view/223265>. For party affiliations, see <http://senate.ca.gov/senators>, <http://assembly.ca.gov/assemblymembers>.

<sup>116</sup> See A.B. 117, California Legislature, 2011–2012 Regular Session (2011). See also Order Requiring Interim Reports at 1, *Coleman v. Brown*, No. 90-cv-00529, No. 01-cv-01351 (E.D. Cal., N.D. Cal. June 30, 2011), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0059.pdf>.

<sup>117</sup> See A.B. 109 sec. 450, § 1170(h)(1), California Legislature, 2011–2012 Regular Session (2011); A.B. 117 §§ 27–28 (codified at CAL. PENAL CODE § 1170 (West 2010)).

<sup>118</sup> See CAL. PENAL CODE § 4024.1 (West 2010) (allowing releases of jail prisoners up to thirty days early under specified circumstances); S.B. 1023, California Legislature, 2011–2012 Regular Session (2011) (amending § 4024.1 to allow releases up to thirty days early, rather than just five days); CAL. PENAL CODE § 1203.016 (West 2010) (allowing substitution of electronic monitoring for incarceration, where authorized by the Board of Supervisors).

<sup>119</sup> Supplemental Brief for Defendant at 1, *Brown v. Plata*, No. 09-1233 (U.S. 2011) (citing A.B. 109 sec. 479, tit. 2.05, § 3451(a) (categories of felony offenders subject to community supervision); see also *id.* at § 3451(b) (persons whom CDCR will still supervise)), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0054.pdf>.

<sup>120</sup> CAL. PENAL CODE § 3001(a) (West 2010).

<sup>121</sup> *Id.* § 3456.

of Parole Hearings. And it requires parole-revocation sentences to be served in county jails rather than in state prisons,<sup>122</sup> lessens the recommitment period for parole revocation from one year to six months, and allows prisoners serving a parole-revocation term to earn credit for good conduct at a rate of 50% instead of 25%.<sup>123</sup>

Realignment started, it seems, with the observation that California's jails had 10,000 empty beds, at the same time as the *Plata/Coleman* population order declared that California's prisons had 30,000 excess prisoners.<sup>124</sup> But crucially, realignment does not directly release anyone. As Medical Care Receiver Clark Kelso explained, "politically, nobody could tolerate a straight release of inmates prior to serving their sentence. But we needed to reduce population by 20,000 to 30,000."<sup>125</sup> Instead of releasing prisoners from state custody, realignment acts only on new admissions, slowing admissions by altering parole terms, penalties, and good-time rules, and gradually shifting the non-non-non and felon parole-revocation population to county jails. I discuss the impact on county jail populations, and the varied coping strategies, in the subpart immediately following.

The counties — including sheriffs, district attorneys, and other politically powerful stakeholders — went along with this approach, albeit reluctantly. As Orange County Sheriff Sandra Hutchens explains, "We had no choice. The State had to deal with the three-judge panel and reduce population. The sheriffs were given the option of working with the State on a plan, or the State releasing tens of thousands of prisoners early, with no supervision."<sup>126</sup> Nonetheless, counties would never have agreed to this shift from state to county responsibility without funding — over \$1 billion annually of state sales tax revenue, phased in over several years,<sup>127</sup> added to acceleration of \$1.2 billion in jail construction bonding funding that had been authorized in 2007.<sup>128</sup> This is a lot of money, but to be clear, it is not enough to fund, one-for-one, the entire cost of what will now be county prisoners. In fact, for non-non-non prisoners sentenced to serve less than three years, the funding formula was based on an estimate of only six months of funding; for

---

<sup>122</sup> A.B. 109 sec. 470, § 3000.09(e); A.B. 117 § 1 (codified at CAL. GOV'T CODE § 71622.5 (West 2011)), § 38 (codified at CAL. PENAL CODE § 3000.08 (West 2010)), § 44 (codified at CAL. PENAL CODE § 3056 (West 2010)), § 50 (codified at CAL. PENAL CODE § 3455 (West 2011)). See also A.B. 117 § 38 (assigning *all* parole revocation, including for those who are not "non-non-nons," to superior court (county) process, effective July 1, 2013).

<sup>123</sup> A.B. 109 sec. 482, § 4019.

<sup>124</sup> Interview with Matthew Cate, *supra* note 13.

<sup>125</sup> Interview with Clark Kelso, *supra* note 13.

<sup>126</sup> Interview with Sandra Hutchens, *supra* note 13.

<sup>127</sup> A.B. 118 ch. 40, § 3, California Legislature, 2011-2012 Regular Session (2011) (codified at CAL. GOV'T CODE § 30025 et seq. (West 2011)).

<sup>128</sup> Public Safety and Offender Rehabilitation Services Act of 2007, A.B. 900, California Legislature, 2007-2008 Regular Session (2007).

longer-term non-non-non prisoners, the estimate was twenty months of funding.<sup>129</sup>

Because realignment would not provide the counties with enough money to fund their increased responsibilities, the deal needed a sweetener. The crucial financial incentive was that the money came essentially with no strings attached. Realignment money is a county block grant, allocated by a formula that considered the number of offenders historically sent to state prison, the county's adult population, and prior grant funding.<sup>130</sup> Counties can use the funding to increase jail capacity, to pay for alternatives to incarceration, to expand drug addiction programs — whatever they work out with their newly established Local Community Corrections Partnership Executive Committee, which brings together each county's chief probation officer, sheriff, district attorney, public defender, presiding judge, and a police chief and social services department official.<sup>131</sup> At the same time, of course, county criminal justice leaders know that no promise made by the governor can bind the legislature, and that no promise made by the legislature can prevent a later change of plan.<sup>132</sup> As sheriffs' lobbyist Nick Warner points out, "The major tenet of realignment is local flexibility." But that may already be slipping, he says: "Legislators are forgetting the deal. They are doing what legislators do; they are trying to control."<sup>133</sup>

In addition, even if it stays string-free, the money itself is not, so far, guaranteed. This is, even more than the prospect that the legislature will try to dictate criminal justice policy, extremely anxiety-provoking for the counties; it recalls the devolution of responsibility for mental health services from state to regional entities two decades earlier, which was inadequately funded notwithstanding the state's early promises.<sup>134</sup> Warner believes that "it's possible, as the economy is bottoming out, that we could engage in a massive shift of population to the counties, with no or declining funds. That would be the biggest early-release program ever — a complete disaster."<sup>135</sup> Governor Brown has succeeded in insulating the funding to some extent: over the

<sup>129</sup> For extensive explanation of the funding formulas, see Dean Misczynski, PUB. POLICY INST. OF CAL., *RETHINKING THE STATE-LOCAL RELATIONSHIP: CORRECTIONS* (2011), available at [http://www.ppic.org/content/pubs/report/R\\_811DMR.pdf](http://www.ppic.org/content/pubs/report/R_811DMR.pdf).

<sup>130</sup> See LEGISLATIVE ANALYSIS OFFICE, *THE 2012-13 BUDGET: THE 2011 REALIGNMENT OF ADULT OFFENDERS — AN UPDATE 13* (Feb. 22, 2012), available at <http://www.cdcr.ca.gov/Reports/docs/External-Reports/2011-realignment-of-adult-offenders-022212.pdf>.

<sup>131</sup> For analysis of the functioning of the committees, see Verma, *supra* note 20.

<sup>132</sup> Interview with Bill Crout, *supra* note 13 ("The state has a long history of moving problems from the state to the local level, funding for a short time, and then cutting the funding."); Interview with Nick Warner, *supra* note 13.

<sup>133</sup> Interview with Nick Warner, *supra* note 13.

<sup>134</sup> See generally J.R. Elpers, *Public Mental Health Funding in California, 1959–1989*, 40 HOSP. & COMMUNITY PSYCHIATRY 799 (1989); Mary Masland, *The Political Development of 'Program Realignment': California's 1991 Mental Health Care Reform*, 23 J. MENTAL HEALTH ADMIN. 170 (1998); Verma, *supra* note 20 (drawing this comparison). For a discussion of deinstitutionalization politics, see generally Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1 (2012).

<sup>135</sup> Interview with Nick Warner, *supra* note 13.



objection of Republican legislators, realignment money was made a continuous funding stream that a future legislature would have to vote affirmatively to change (subject to gubernatorial veto), rather than a year-by-year funding stream that future legislatures would have to vote to maintain.<sup>136</sup> In addition, the Governor agreed to sponsor a ballot initiative for November 2012 to protect the funding from legislative erosion by enacting a state constitutional amendment.<sup>137</sup> He has done this, and coupled it with school funding in what proved to be a successful effort to secure passage.<sup>138</sup>

Realignment's financial risk for the counties is not shared by the state; from Sacramento's perspective, the budgetary impact is unambiguously positive — an enormous source of its appeal in the midst of California's severe budget crisis. Even though realignment required a massive transfer of funds from the state to the counties, that transfer amounts to substantially less money than the state would itself have spent otherwise. Moreover, savings were doubly helpful for the Governor's budget because of the interaction with Proposition 98, which requires the state to spend a set portion of its General Fund revenues on K-12 schooling;<sup>139</sup> realignment money never makes it into the General Fund.<sup>140</sup> And simultaneously, the political damage inherent in reducing prison population was minimized by the argument that prisoners were neither being released, nor having their sentences shortened (by much); they were merely being moved. Even so, realignment depended for passage on a crucial change to California budget politics, approved by voters in the same election that voted in Governor Brown: Proposition 25 made it possible for a bare majority to pass a budget in the state legislature, where previously a two-thirds vote had been required.<sup>141</sup> Only one Republican voted for realignment in either the California Assembly or Senate; a two-thirds requirement would have killed the deal.<sup>142</sup>

Realignment ended up with an effective start date of October 1, 2011,<sup>143</sup> so although some population reduction based on earlier reforms had already

<sup>136</sup> See A.B. 111, California Legislature, 2011–2012 Regular Session (2011); A.B. 94, California Legislature, 2011–2012 Regular Session (2011); A.B. 118, California Legislature, 2011–2012 Regular Session (2011); S.B. 89, California Legislature, 2011–2012 Regular Session (2011); S.B. 87, California Legislature, 2011–2012 Regular Session (2011). For the state's summary of funding enactments, see *Funding of Realignment*, CAL. DEP'T OF CORR. AND REHAB., available at <http://www.cdcr.ca.gov/realignment/Funding-Realignment.html>.

<sup>137</sup> See Letter from Governor Jerry Brown to Members of the Cal. State Assembly Corr. & Rehab., available at [http://gov.ca.gov/docs/AB\\_109\\_Signing\\_Message.pdf](http://gov.ca.gov/docs/AB_109_Signing_Message.pdf).

<sup>138</sup> Schools and Local Public Safety Act, A.B. 18A, California Legislature, 2011–2012 Regular Session (2011); *Text of Proposed Laws*, CAL. SEC'Y OF STATE, <http://vig.cdn.sos.ca.gov/2012/general/pdf/text-proposed-laws-v2.pdf#nameddest=prop30>. Proposition 30 was approved on November 6, 2012.

<sup>139</sup> ROB MANWARING, LEGISLATIVE ANALYST'S OFFICE, PROPOSITION 98 PRIMER (2005), available at [http://www.lao.ca.gov/2005/prop\\_98\\_primer/prop\\_98\\_primer\\_020805.htm](http://www.lao.ca.gov/2005/prop_98_primer/prop_98_primer_020805.htm).

<sup>140</sup> CAL. REV. & TAX. CODE §§ 6051.15, 6201.15 (West 2011).

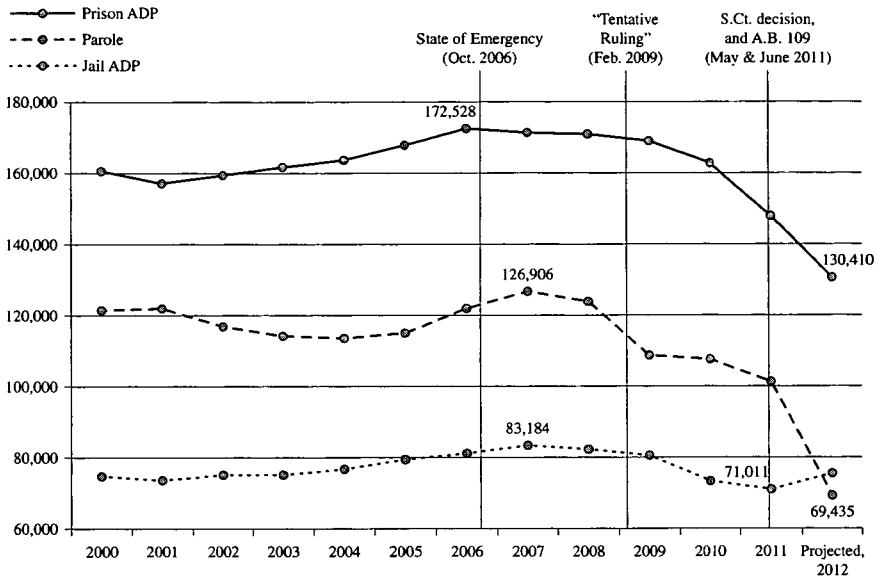
<sup>141</sup> Secretary Matt Cate and his legislative affairs aide, Aaron Maguire, made this point to me in a telephone interview. Interview with Matthew Cate, *supra* note 13.

<sup>142</sup> See sources cited *supra* note 115.

<sup>143</sup> See A.B. 116 § 3(h)(6), California Legislature, 2011–2012 Regular Session (2011).

occurred by the time of the Supreme Court opinion, the sharper reductions ushered in by realignment occurred later. See Figure 1.

FIGURE 1: CALIFORNIA CRIMINAL JUSTICE POPULATIONS, 2000–2012



Source: CDCR & Cal. Bd. of State and Cmty. Corr.; see Technical Appendix, *infra* note 176.

By order of the three-judge court, California began reporting monthly on its progress towards the two-year 137.5% goal, as well as the interim six-month goals. The state reached the first six-month goal (167% of design capacity) on time, and reached the one-year goal (155% of design capacity) two months early. Population is on track to meet December 2012's benchmark (147% of capacity). But the state is resisting the requirement that it reduce population to meet subsequent deadlines. CDCR's public population projections are that in June 2013, two years after the population order's start, prison population would be at 141%, not 137.5%, of design capacity — about 3,000 prisoners over, if the currently out-of-state prisoners are brought back to California, a move that would save considerable money.<sup>144</sup> In May 2012, California filed a brief that explained that if those projections held, it planned to request modification of the population order to increase the final goal to 145% of design capacity; defendants promised to support that request by “demonstrating that they can provide a constitutional level of care at a

<sup>144</sup> See CDCR, BLUEPRINT, *supra* note 7, at 6; see also Order Requiring Interim Reports at 2, *Coleman v. Brown*, No. 90-cv-00529, No. 01-cv-01351 (E.D. Cal., N.D. Cal. June 30, 2011), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0059.pdf>.

higher population density.”<sup>145</sup> Plaintiffs’ counsel, predictably enough, objected vehemently.<sup>146</sup> The three-judge court’s response has remained measured but quite firm: on September 7, 2012, the court noted that it was “not inclined to entertain a motion to modify the 137.5% population cap based on the factual circumstances identified by defendants,” but that it was more favorably disposed towards a potential motion for a six-month extension. It instructed the State to file papers identifying methods for compliance,<sup>147</sup> and in response to those papers, is now requiring the State to develop a population reduction plan by January 2013.<sup>148</sup>

As for medical and mental health care in prison, some aspects of care are certainly improving. In May, the receiver’s report noted a number of ongoing problems and challenges, but summarized:

It is clear that we have made significant progress towards full implementation of the Turnaround Plan of Action and towards our ultimate goal of providing a constitutionally adequate level of medical care within California’s adult prisons. . . . [T]he scores reported by the OIG [California Office of the Inspector General] [are] showing consistent improvement, the number of clearly avoidable deaths [is] remaining at a consistently low rate, and . . . progress [is] being made by the State in reducing overcrowding.<sup>149</sup>

Judge Henderson responded by pivoting the case towards its next phase, in which the receivership will be phased out, facility by facility.<sup>150</sup> The most recent *Coleman* special master’s report is less positive, but it too

---

<sup>145</sup> Defendants’ Opposition to Plaintiffs’ Renewed Motion for an Order Requiring Defendants to Demonstrate How They Will Achieve the Required Population Reduction by June 2013 at 2, *Coleman v. Brown*, No. 90-cv-00529, No. 01-cv-01351 (E.D. Cal., N.D. Cal. May 23, 2012), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0045.pdf>; see also Defendants’ Response to June 7, 2012 Order Requiring Further Briefing at 1, *Coleman v. Brown*, No. 90-cv-00529, No. 01-cv-01351 (E.D. Cal., N.D. Cal. June 22, 2012), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0080.pdf>.

<sup>146</sup> Plaintiffs’ Application for Limited Discovery and Order to Show Cause Re Contempt at 1, *Coleman v. Brown*, No. 90-cv-00529, No. 01-cv-01351 (E.D. Cal., N.D. Cal. Aug. 22, 2012), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0094.pdf>.

<sup>147</sup> Order Granting in Part and Denying in Part Plaintiffs’ May 9 and August 22, 2012 Motions at 3–4, *Coleman v. Brown*, No. 90-cv-00529, No. 01-cv-01351 (E.D. Cal., N.D. Cal. Sept. 7, 2012), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0093.pdf>.

<sup>148</sup> Order to Develop Plans to Achieve Required Prison Population Reduction at 1, *Coleman v. Brown*, No. 90-cv-00529, No. 01-cv-01351 (E.D. Cal., N.D. Cal. Oct. 11, 2012), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0072.pdf>.

<sup>149</sup> Achieving a Constitutional Level of Medical Care in California’s Prisons: Twentieth Tri-Annual Report of the Federal Receiver’s Turnaround Plan of Action, for January 1 – April 30, 2012 at 26, *Plata v. Brown*, No. 01-cv-01351 (N.D. Cal. May 12, 2012), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0018-0094.pdf>.

<sup>150</sup> See Order Proposing Receivership Transition Plan at 1, *Plata v. Brown*, No. 01-cv-01351 (N.D. Cal. May 30, 2012), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0018-0084.pdf>; Order Re: Receivership Transition Plan and Expert Evaluations at 6–8, *Plata v. Brown*, No. 01-cv-01351 (N.D. Cal. Sept. 5, 2012), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0018-0098.pdf>.

notes a number of areas of improvement.<sup>151</sup> Plaintiffs' counsel continue to see serious medical and mental health care deficiencies, but they agree that real improvements have occurred.<sup>152</sup>

#### D. Realignment in the Counties

Moving prisoners from state to county custody, as realignment does, has two key features. First, it shifts population from the court-scrutinized state system to the less crowded and less scrutinized counties. But much more important — and even apart from the necessarily population-reducing parole changes<sup>153</sup> — such a move has the potential to be decarcerative because it shifts prisoners from low-discretion state custody to high-discretion county custody. It is because of that discretion that California counties vary so extremely in their incarceration rates, even after controlling for population and crime rates.<sup>154</sup> As *The Economist* explained recently:

Sheriffs can, for example, send troublemakers to mental-health treatment instead of jail. They can “flash-incarcerate” people for just a few hours. They can put them under home surveillance with a GPS monitor strapped to their ankle, or make them do community service and drug rehabilitation. They can refer them to vocational training so they can get jobs.<sup>155</sup>

Realignment combines three ideas: to use the county beds that were empty prior to realignment; to expand incarcerative capacity to some extent; and to reduce incarceration by using various alternative pretrial reporting and sentencing methods — day-reporting centers, home detention with GPS monitoring, intensive probation, and the like. The decarceration methods can be used for the non-non-nons, or, more likely, for other county prisoners. But however the methods are implemented, realignment was intended to induce, though not to require, an ambitious and incarceration-reducing set of

---

<sup>151</sup> Twenty-Fourth Round Monitoring Report of the Special Master on the Defendants' Compliance with Provisionally Approved Plans, Policies, and Protocols at 9–11, *Coleman v. Brown*, No. 90-cv-00520 (E.D. Cal. July 2, 2012), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0036.pdf>.

<sup>152</sup> Interview with Michael Bien, *supra* note 13; Interview with Don Specter, *supra* note 13.

<sup>153</sup> Recall, under realignment, parole supervision for non-non-non offenders released from prison is shortened: although the basic supervision term for most offenders is still set at three years, the new law encourages discharge from supervision after six months free of custody, and mandates discharge after one year free of custody. The point is that fewer violations will occur in this shortened time. And the custody term for parole violation has moved from twelve months with the potential for a one-quarter reduction based on good conduct, to six months with the potential for a one-half reduction; that, too, will produce fewer prisoners in custody on any given day. A.B. 109 § 482, California Legislature, 2011–2012 Regular Session (2011).

<sup>154</sup> See generally Ball, *supra* note 19.

<sup>155</sup> *California's Overcrowded Prisons: The Challenges of “Realignment,”* THE ECONOMIST, May 19, 2012, <http://www.economist.com/node/21555611>.

changes. In this Part, I discuss potential effects, and what seems actually to be happening.

Logically, counties have three possible responses to the realignment wave of prisoners who would have otherwise entered state custody. They can, alone or in combination, expand capacity, limit admissions or sentences, or release prisoners:

*Expansion:* Counties could, theoretically, absorb at least some of the influx of new prisoners and, if they wish, avoid decarceration by building new jails or wings of jails, buying no-longer-needed state facilities, or some similar strategy. And in fact, the state has approved applications by twenty-one counties to use A.B. 900 money to build over 10,000 new jail beds — a total of \$1.2 billion in jail capacity expansion.<sup>156</sup> In addition, the state has another \$500 million jail construction program in the works, which may fund added capacity or treatment space.<sup>157</sup> In addition, a recent ACLU analysis of county realignment plans tallies that the counties are reporting their intent to use realignment funds to expand capacity by as much as another 7,000 beds.<sup>158</sup>

If all of this building actually occurs, it would total over 17,000 new jail beds — a huge portion of the prison population reduction required by the *Plata/Coleman* population order. But it seems unlikely that all the building will, in fact, occur. Non-A.B. 900 building relies on money the counties can otherwise spend on other priorities, which means that even plans already announced are tentative — and that the building is unlikely to happen unless prompted by significant crowding. A.B. 900 building is, however, a different story, because it uses 90% state money.<sup>159</sup> In Orange County, for example, the sheriff plans to build over 500 beds using \$100 million in A.B. 900 bond funds,<sup>160</sup> even though it could easily solve any shortage of jail beds by refusing to house federal immigrant detainees.<sup>161</sup>

*Limiting admissions and sentences:* At the same time, some of the counties are simultaneously or instead looking at nonbuilding options: expansions of pretrial classification, bail reform, electronic monitoring, drug rehabilitation and reentry assistance for prisoners to reduce recidivism, work

---

<sup>156</sup> See generally A.B. 900, California Legislature, 2007–2008 Regular Session (2008) (setting up jail capacity funding); Interview with Bob Takeshta, *supra* note 13.

<sup>157</sup> See S.B. 1022, California Legislature, 2011–2012 Regular Session (2012), codified at 2012 Cal. Stat. ch. 42; Interview with Bob Takeshta, *supra* note 13.

<sup>158</sup> ACLU OF CAL., PUBLIC SAFETY REALIGNMENT: CALIFORNIA AT A CROSSROADS 15 (2012), available at [https://www.aclunc.org/docs/criminal\\_justice/public\\_safety\\_realignment\\_california\\_at\\_a\\_crossroads.pdf](https://www.aclunc.org/docs/criminal_justice/public_safety_realignment_california_at_a_crossroads.pdf).

<sup>159</sup> A.B. 900 § 2. The match rate was subsequently reduced to ten percent by A.B. 94 § 3, California Legislature, 2011–2012 Regular Session (2011) (amending CAL. GOV'T CODE § 15820.917 (West 2011)).

<sup>160</sup> Sean Emery, *O.C. Sheriff Gets Funds for Major Musick Jail Expansion*, ORANGE COUNTY REG., Mar. 8, 2012, at B1.

<sup>161</sup> Interview with Sandra Hutchens, *supra* note 13. Orange County voluntarily houses about 700 federal immigrant detainees, and gets about thirty million dollars in exchange.

furlough, and day-reporting centers.<sup>162</sup> Many California counties have obvious types of overincarceration; in an interview in July, Corrections Secretary Matt Cate pointed out, for example, that in some counties, pretrial detainees constituted three-quarters or more of jail population<sup>163</sup> — this was compared to a state average, in 2011, of 70%<sup>164</sup> and a national average of 60%,<sup>165</sup> itself up almost ten percentage points from the national average two decades ago.<sup>166</sup> If the number of sentenced prisoners were held constant, decreasing California's statewide pretrial incarceration so that it amounts to 60% of jail population, as it did in 2000 and still does nationwide, could alone cause a population reduction of nearly 18,000 county prisoners.<sup>167</sup> Cate suggests that “evidence-based criminal justice practices came to California just in time,” because counties can use objective classification and risk assessment instruments that “have been reviewed and have real data behind them” to decide whom not to admit and whom to release (more on such releases immediately below). The result, he argues, is that jail population reduction can take place while minimizing any public safety downside.<sup>168</sup> Plata's Judge Henderson, too, reports that he had no interest in “dumping the state's problems onto the counties.” He continues, “That's why I was hopeful that this would force the counties to reexamine who they are keeping in their jails; force them to examine their halfway houses and work furloughs. I'm hoping still that may be the end effect here.”<sup>169</sup>

*Prisoner releases:* Thus far, the story I am telling is evident from the legislative findings and language, and from CDCR and state reports. An additional feature of the ecosystem is not a secret, but it has not been publicly discussed to nearly the same extent. The hope that realignment will be decarcerative relies not just on county discretion, but on court-enforceable

<sup>162</sup> *Id.*; see also Interview with Gary Wion, *supra* note 13; Kurtis Alexander, *Fresno County Takes Cheaper Step of Criminal Rehab*, FRESNO BEE, June 26, 2012 (describing commitment by Fresno's Community Corrections Partnership of \$848,000 for residential drug treatment); Interview with Nick Warner, *supra* note 13.

<sup>163</sup> Interview with Matthew Cate, *supra* note 13. At the end of 2011, California's jail survey listed eighteen jails in which pretrial prisoners constituted 75% or more of all prisoners. See FACILITIES STANDARDS & OPERATIONS DIV., CORR. STANDARDS AUTH., JAIL PROFILE SURVEY, 4TH QUARTER 5 (2011), available at [http://www.bscc.ca.gov/download.php?f=/2011\\_4th\\_qtr\\_JPS\\_full\\_report.pdf](http://www.bscc.ca.gov/download.php?f=/2011_4th_qtr_JPS_full_report.pdf).

<sup>164</sup> See FACILITIES STANDARDS & OPERATIONS DIV., *supra* note 163, at 5.

<sup>165</sup> See TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2011 — STATISTICAL TABLES 7 tbl.9 (2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim11st.pdf>.

<sup>166</sup> BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISON AND JAIL INMATES AT MIDYEAR 2000 9 (2001), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pjim00.pdf>.

<sup>167</sup> In fact, what has happened so far in 2012 is that the number of pretrial detainees has decreased by less than 2,000 people, while the number of sentenced prisoners has increased by nearly 9,000 people. So the current proportion of jail population that is pretrial is down to 62%; jail population overall is up. See FACILITIES STANDARDS & OPERATIONS DIV., CORR. STANDARDS AUTH., JAIL PROFILE SURVEY, 2ND QUARTER 4 (2012), available at [http://www.bscc.ca.gov/download.php?f=/2012\\_2nd\\_Qtr\\_JPS\\_full\\_report.pdf](http://www.bscc.ca.gov/download.php?f=/2012_2nd_Qtr_JPS_full_report.pdf).

<sup>168</sup> Interview with Matthew Cate, *supra* note 13.

<sup>169</sup> Interview with Thelton Henderson, *supra* note 13.

population caps. Currently covering over a third of California's jails and jail population, these orders have for two decades led each month to thousands of prisoner releases when jail population runs up against the caps. (Of course, county releases need not affect the actual prisoners shifted to the counties under realignment; counties can pick whom to release, and are likely to pick misdemeanants rather than felons, and pretrial prisoners rather than convicts.) I discuss the history and functioning of population orders, both generally and in California specifically, in depth in Section III.A, below. For current purposes, it suffices to quote Clark Kelso again: "To some extent, the state is taking advantage of the fact that the jails have federally imposed caps. They already know how to figure out who gets released, and who doesn't. The sheriffs already know how to take the political heat."<sup>170</sup>

There is deep dissensus among observers about the prospects for non-incarcerative county responses to realignment. Some, like Barry Krisberg, describe the plan of evidence-based sentencing reform at the county level as a "liberal fantasy." His pessimistic conclusion is that reform is impossible: "The progressives are saying, if we do pretrial reform, we could free up space," but the sheriffs and other county officials "don't really have any interest in fundamentally reforming."<sup>171</sup> But sheriffs' lobbyist Nick Warner says that while change is "painful as hell," it is nonetheless occurring. He describes the goal as "taking the lower-level inmates and programming them" instead of putting them in jail. The result, he says, "is a crisis for sure — and a huge opportunity. It's forcing change, which is scary but really exciting." The results are very diverse, he reports; in some counties, there are "a lot of good things going on." In others, "we'll have overcrowded local jails, and people will sue the pants off us."<sup>172</sup>

Of course, some who believe that the results of realignment will, indeed, be decarcerative find that deeply problematic. Kimberly Hall Barlow, who represented the sheriffs and other law enforcement intervenors in the three-judge court trial, thinks that realignment will depress jail admissions and increase jail releases, and that the result will be insufficient punishment and insufficient deterrence. She points out another admissions mechanism: Because "courts are aware that space is limited, they will sentence people to probation instead of custody. . . . That's especially true for more complex populations; women, drug addicts, the mentally ill."<sup>173</sup> California's newspapers are full of speculation that realignment will in turn increase crime.<sup>174</sup> Others speculate that prosecutors and judges will respond in the opposite

---

<sup>170</sup> Interview with Clark Kelso, *supra* note 13.

<sup>171</sup> Interview with Barry Krisberg, *supra* note 13.

<sup>172</sup> Interview with Nick Warner, *supra* note 13.

<sup>173</sup> Interview with Kimberly Hall Barlow, *supra* note 13.

<sup>174</sup> See, e.g., Gillian Flaccus, *Calif. Inmate Switch Puts Pressure on County Jails*, ASSOCIATED PRESS, May 19, 2012, available at <http://www.sfgate.com/news/article/Calif-inmate-switch-puts-pressure-on-county-jails-3570813.php>.

way, ratcheting up charges and sentences in order to assure state rather than county custody for particular offenders.<sup>175</sup>

It is too soon to say who is right factually about even the trends in population, much less in crime. Jail population is up, but much less than the concomitant *decrease* in prison population. From October 1, 2011 to October 1, 2012, California's prison population was down over 23,000; over the same period of time, jail population was up, but only by 6,000.<sup>176</sup>

It may be foolhardy to attempt with so few post-realignment datapoints to discern trends, but at least the preliminary indications suggest several possible changes to look for:

- Decline in several components of jail population:
  - misdemeanants
  - state-contracted prisoners
  - prisoners awaiting CDCR transport
- Increase in average length of stay
- Decline in bookings

All but the final item on the list are predictable given realignment's terms. As jails get an increased influx of felony prisoners, both non-nons and parole violators, one would expect sheriffs to prioritize bonding out, alternatively supervising, or otherwise releasing the relatively low-priority misdemeanor prisoners, whether they are awaiting trial or serving sentences. The remaining prisoners would then presumably stay somewhat longer than those they are replacing. And as the state experiences less prison crowding, one would expect CDCR to house its own prisoners<sup>177</sup> rather than paying jails to hold them, and to pick up more speedily sentenced prisoners doing state time (whose care in county custody they are also otherwise required to pay for, after several days).<sup>178</sup>

The decline in bookings that took place in the final quarter of 2011, noted in the final bullet, was very sharp — a greater than 10% decrease from prior quarters, which were themselves down substantially from prior years.<sup>179</sup> The cause is not obvious to me, and some part of the decline was reversed in subsequent quarters. Guesses about causes from those I have asked vary. (Could it be declining crime rates? Budget cuts to the courts,

<sup>175</sup> This point was made to me by Mona Lynch. See MIKE MALES, CTR. ON JUVENILE & CRIMINAL JUSTICE, UPDATE: NINE MONTHS INTO REALIGNMENT: CALIFORNIA'S PRISONER DECLINE CONTINUES, NEW ADMISSIONS RISE 5 (2012), available at [http://www.cjcb.org/files/Realignment\\_update\\_Aug\\_15\\_2012.pdf](http://www.cjcb.org/files/Realignment_update_Aug_15_2012.pdf) (last visited Aug. 15, 2012).

<sup>176</sup> It is possible that this slightly understates the effect of realignment because California's jails were seeing slowly declining population from 2007 to mid-2011. Additional data are posted in this Article's Technical Appendix, available at <http://www.law.umich.edu/faculty/home/margoschlanger/Pages/Publications.aspx>.

<sup>177</sup> By "its own prisoners," I mean prisoners who, even after realignment, are sentenced to state time, but whom the state nonetheless chooses to house in a county jail.

<sup>178</sup> See CAL. PENAL CODE § 4016.5(a)(1) (West 2010).

<sup>179</sup> See Technical Appendix, *supra* note 176.



reducing case processing? Or something else?<sup>180</sup>) This is a statistic that is worth noting and watching carefully.

\* \* \*

The overall story of *Plata*, *Coleman*, and California prison reform is that the litigation is likely to succeed in prompting a politically negotiated reduction in state prison population back to the level of 1993, necessary to allow improvements in medical and mental health care. The question remains to what extent California's realignment reforms will prompt expansion, shift prisoners from the state to counties, or promote various detention alternatives.

In the remainder of this Article, I examine two topics in greater depth: first, the jail population orders described briefly above, and second, the potential for varied litigation responses to the challenges posed by increasing jail population.

### III. JAIL POPULATION ORDERS

#### A. Prevalence, Origin, and the One-Prisoner-One-Bed Rule

Notwithstanding Justice Scalia's accusation of radicalism, jail and prison population orders — imposed by federal and state trial courts during civil rights litigation, or developed as part of court settlements — were once commonplace.<sup>181</sup> Prior population caps imposed statewide, as in *Plata* and *Coleman*, include orders in the epic prison litigations of *Williams v. McKeithen* (Louisiana), *Costello v. Wainwright* (Florida), and *Ruiz v. Estelle* (Texas).<sup>182</sup> Thus, the *Plata/Coleman* population order is far from unprecedented — although as an order applicable to what was in 2009 the largest state system, at the United States' peak in incarceration, it tops any list by size. It is true, however, that the other statewide prison population caps began and ended years ago: the *Williams* order, for example, lasted from 1983 to 1996,<sup>183</sup> the *Costello* order from 1977 to 1992,<sup>184</sup> and the *Ruiz* order

<sup>180</sup> The first two hypotheses were shared with me by Ernie Galvan.

<sup>181</sup> For lists and information about dozens of prison and jail population caps, see the Civil Rights Litigation Clearinghouse; the collections are available at <http://bit.ly/Prison-Pop-Caps>, and <http://bit.ly/Jail-Pop-Caps>.

<sup>182</sup> For a full procedural history and copies of the many opinions and crucial orders in *Williams v. McKeithen*, No. 71-cv-0098B (M.D. La. Mar. 26, 1971), see <http://www.clearinghouse.net/detail.php?id=722>; for those in *Costello v. Wainwright*, No. 72-cv-00109 (M.D. Fla. Feb. 9, 1972), see <http://www.clearinghouse.net/detail.php?id=644>; and for those in *Ruiz v. Estelle*, No. 78-cv-00987 (S.D. Tex. June 1, 1978), see <http://www.clearinghouse.net/detail.php?id=960>.

<sup>183</sup> See Order Approving Settlement at 1–2, *Williams v. McKeithen*, No. 71-cv-0098B (M.D. La. Sept. 26, 1996), available at <http://www.clearinghouse.net/detailDocument.php?id=3585>.

<sup>184</sup> See *Celestineo v. Singletary*, 147 F.R.D. 258, 264 (M.D. Fla. 1993).

from 1981 to 2001.<sup>185</sup> Apart from the *Plata/Coleman* order, there has not been a new statewide prison population order in many years. Much more typical, particularly in recent years, have been orders like those that currently apply to the jails in about a third of California's fifty-eight counties, covering about a third of the state's jail population.<sup>186</sup> This Part discusses those run-of-the-mill population orders, putting them in context and examining how they function in California.

Even as the Supreme Court held over thirty years ago that prison and jail crowding do not alone violate the Constitution,<sup>187</sup> the Court's opinions expressly left open the path of crowding-ameliorating orders to remedy the constitutionally cognizable problems caused by crowding. Accordingly, in conditions of confinement cases addressing health, safety, sanitation, nutrition, and the like, for pretrial detainees and convicted offenders in jails and prisons alike, court orders have often capped the population permissibly housed at particular incarcerative facilities or within systems. Those orders might specify a number of prisoners, a per-prisoner space requirement (which works out to the same thing, absent construction), or a permissible percentage of some measure of capacity. The paragraph above cites three major examples of prison-system population orders. While jail orders have been mostly much lower profile, they have also been consistently more prevalent — and especially so in California.<sup>188</sup> The *Plata/Coleman* three-judge district court highlighted three jail examples, in Chicago, Alabama (statewide, about state prisoners in county jails), and Los Angeles.<sup>189</sup>

Orders like these are not rare now — and in the 1980s and 1990s, they were positively commonplace throughout the country. The Department of Justice started periodically tallying jail and prison population caps in 1983 and 1984, respectively. Table 1 sets out the resulting national and California

---

<sup>185</sup> See *Ruiz v. Johnson*, 15 F. Supp. 2d 975, 995 (S.D. Tex. 2001).

<sup>186</sup> Counting population caps is not as cut and dried as it might seem, but my research and that of the California Board of State and Community Corrections agree on these counts. The covered population figure depends a great deal on whether the L.A. County jail system, the largest in America, is deemed to have a population cap or not. There is, in fact, both a numeric cap and a “one-prisoner-one-bed” order in effect in L.A. County, but the cap is sufficiently high that it does not seem to have any operational impact; according to plaintiffs’ counsel in *Rutherford v. Block*, the L.A. County jail is operationally vastly over-crowded even though its population is well under its court-ordered population cap. Interview with Peter Eliasberg, *supra* note 13. If the L.A. County jail population were included in the tally in the footnoted text, the sentence would need to be amended to say that population orders cover well over half the state’s jail population.

<sup>187</sup> See *Rhodes v. Chapman*, 452 U.S. 337, 347–48 (1981); *Bell v. Wolfish*, 441 U.S. 520, 542 (1979).

<sup>188</sup> See WAYNE N. WELSH, COUNTIES IN COURT: JAIL OVERCROWDING AND COURT-ORDERED REFORM 7, 161–70 (1995).

<sup>189</sup> Opinion and Order at 28, *Coleman v. Schwarzenegger*, No. 90-cv-00529, No. 01-cv-01351 (E.D. Cal., N.D. Cal. Aug. 4, 2009), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0032.pdf> (citing *Duran v. Elrod*, 713 F.2d 292 (7th Cir. 1983); *Newman v. Alabama*, 683 F.2d 1312 (11th Cir. 1982); and *Rutherford v. Pitchess*, 457 F. Supp. 104 (C.D. Cal. 1978)).

tabulations.<sup>190</sup> (Data on the reported age, in years, of the population orders is available only since 1999.)

TABLE 1: PREVALENCE OF JAIL AND PRISON POPULATION CAPS,  
NATIONWIDE AND IN CALIFORNIA

	Year	(a) Average daily prisoner population		(b) % of population housed in facilities w/ population cap		(c) Median age, if known, in years	
		National	California	National	California	National	California
Local Jails	1983	227,543	40,622	30%	25%		
	1988	336,017	63,359	43%	77%		
	1993	466,155	73,711	38%	74%		
	1999	607,980	77,851	25%	71%	6	7
	2006	757,978*	80,625*	11%	32%	8	14
State Prisons	1984	390,334	37,264	27%	16%		
	1990	635,974	86,966	24%	7%		
	1995	909,546	123,991	17%	8%		
	2000	1,170,172	159,223	13%	9%	9	2
	2005	1,427,781	177,500	2%	3%	11	0

\* Estimate

Source: Derived from BJS jail and prison censuses; see Technical Appendix, *supra* note 176.

As Table 1's column (b) shows, far from being radical or even unusual, at their reported peak in the 1980s, population orders in civil rights cases covered a very significant proportion of jail and prison facilities and population nationwide. And they were even more prevalent in California jails. In fact, beginning in 1988, California has been outdone on this measure on only four occasions: in 1993 and 1999, by the District of Columbia (whose single jail reported a population cap); in 1988, by Louisiana (whose jails were under a statewide court order);<sup>191</sup> and in 2006, by Arizona.<sup>192</sup>

<sup>190</sup> The table compiles data that is suggestive, but not error free. Still, for purposes of analyzing trends, the jail and prison censuses are basically the only credible national source. Sources are listed in this Article's Technical Appendix, *supra* note 176.

<sup>191</sup> For information on the complex Louisiana litigation, see *Hamilton v. Morial*, 644 F.2d 351, 354 (5th Cir. 1981) (directing that all jail and prison litigation be consolidated in the Middle District of Louisiana); *Williams v. Edwards*, No. 71-cv-0098B (M.D. La. Mar. 26, 1971), available at <http://www.clearinghouse.net/detail.php?id=722>; see generally *In re Parish Prison Populations*, No. 82-cv-00745 (M.D. La. Sept. 7, 1982), available at <http://www.clearinghouse.net/detail.php?id=5514>.

<sup>192</sup> Table 1's figures show a sharp decline in California's jail population cap coverage after 1999, from a reported 71% of population in 1999 to less than half that in 2006. This is due to the reported end of just a few large population caps — in particular, in the nation's largest jail system, Los Angeles. In fact, however, an error underlies the data reported to the Department of Justice reflected in Table 1. The longstanding case *Block v. Rutherford* includes a popula-

Once in place, as column (c) shows, population orders tend to exhibit considerable staying power. Jail and prison officials may be happy to live under a population cap nominally imposed upon them by a federal court. This has remained true even after the 1990s, when “sunset” clauses expressly allowing defendants to seek termination of civil rights injunctive remedies after a period of time came into vogue,<sup>193</sup> the Supreme Court began to emphasize that federal court injunctive orders against state and local governments in civil rights actions should be of limited duration,<sup>194</sup> and the Prison Litigation Reform Act in 1996 allowed jail and prison officials to ask courts to lift orders that were more than two years old.<sup>195</sup> Clark Kelso, the law professor who serves as the court-appointed receiver in charge of the California prison medical system under *Plata*, observes that “operating with a cap is, for corrections people, a joy; you actually can operate.”<sup>196</sup> In addition, as the California sheriffs’ own lobbyist, Nick Warner, explains about the population caps currently in effect for many California jails, “These caps are hedges against liability; it’s unlikely you’ll see any sheriffs ask for them to be lifted.”<sup>197</sup> The result is that defendant prison and jail officials are often slow to seek relief from population orders.

Yet population caps have been declining in prevalence in recent years, even though they can last for years and even decades. Some of the decline is attributable to the PLRA. In addition, although the *Plata/Coleman* order is an obvious counterexample, population orders were more consonant with the type of jail and prison litigation done in the 1970s and 1980s than with the type done in the 1990s and subsequently; as the required evidentiary and causal rigor in injunctive practice has increased, lawyers in prisoners’ rights cases have traded in “kitchen sink” approaches for much more targeted, single- and several-issue cases.<sup>198</sup> Population caps are broader than most modern prison and jail cases.

Whatever the causes, the trend is clear: population caps, even more than other jail and prison civil rights orders, have been growing rarer.<sup>199</sup> However, that trend has by no means led to the extinction of such caps; as Table 1 shows, at last count, ten years after the PLRA, 11% of the nation’s jail

---

tion cap, but it is sufficiently high that jail population is maintained well below it. 468 U.S. 576 (1984). This did not change between 1999 and 2006; all that changed was the way that Los Angeles County answered the survey.

<sup>193</sup> See, e.g., Thomas Bergdall, *A Practitioner’s Guide to Injunctive Civil Rights Settlements and Consent Decrees*, 531 PLI/LIT 305, 330 (1995) (advising civil rights defendants to include a sunset provision in any decree they negotiated); see also Glen R. Jeffes, *The Thirteen Commandments of Negotiating and Living with Consent Decrees*, AM. JAILS, May-June 1990, at 38.

<sup>194</sup> See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 489 (1992) (emphasizing “the district court’s duty to return the operations and control of schools to local authorities” and “the ultimate objective . . . to return school districts to the control of local authorities”).

<sup>195</sup> 18 U.S.C. § 3626(b)(1)(A) (2006).

<sup>196</sup> Interview with Clark Kelso, *supra* note 13.

<sup>197</sup> Interview with Nick Warner, *supra* note 13.

<sup>198</sup> See generally Schlanger, *Civil Rights Injunctions Over Time*, *supra* note 17.

<sup>199</sup> For a table similar to Table 1, but dealing with other types of orders, see *id.* at 578.

population (but only 2% of the nation's prison population) was housed in facilities that reported a population cap. About a dozen of these population orders, nationwide, postdate the PLRA.<sup>200</sup> As in all litigation, these cases have mostly settled; the *Plata/Coleman* order is not only by far the largest of this new generation of population orders, it is also the only one that was contested.

But California has not contributed to the nationwide decline in population caps.<sup>201</sup> The orders have reached and continue to cover a large portion of county jail population. Where did these California orders come from? The answer is several waves of litigation. In the early years of jail and prison litigation, in the 1970s, a number of jail cases were brought by legal services offices and the ACLU of Southern California;<sup>202</sup> a second series of cases was filed in the 1980s by the ACLU's former lawyer, John Hagar, after he started his own law practice; and a third set by lawyers who led an advocacy organization, the Prisoners' Rights Union,<sup>203</sup> in the early 1990s.<sup>204</sup> From the 1990s to today, population cap orders from such cases have governed at least thirty-five counties, including all but two of California's twenty largest counties.<sup>205</sup> Some of those decrees were negotiated very much in the shadow of plaintiffs' threat of nonconsensual court orders. Others were if not precisely collusive at least much more collaborative; they functioned in large part to bolster sheriffs' claims on county funds controlled by boards of supervisors, and to empower, rather than coerce, sheriffs with respect to jail population.<sup>206</sup> Bill Crout, later the head of the Facility Standards and Operations division of the California Standards Association, was the jail commander in San Luis Obispo during one suit. He describes the prisoners' lawyer in a case against his jail as an important ally: "John [Hagar] sued me and the sheriff for jail conditions. He went through the jail, and said, look, you're doing the best you can under these conditions; I'm going to get you some

---

<sup>200</sup> See *supra* note 61.

<sup>201</sup> See *supra* note 192.

<sup>202</sup> WELSH, *supra* note 188, at 161–70; Interview with John Hagar, *supra* note 13.

<sup>203</sup> For information on the Prisoners' Rights Union, see ERIC CUMMINS, *THE RISE AND FALL OF CALIFORNIA'S RADICAL PRISON MOVEMENT 187–220* (1994); Michael Snedeker, *PRU and the Law, THE CALIFORNIA PRISONER*, June 1991, at 1, available at [http://freedomarchives.org/Documents/Finder/DOC510\\_scans/Prisoners\\_Union/510.california.prisoner.vol19.no2.June1991.pdf](http://freedomarchives.org/Documents/Finder/DOC510_scans/Prisoners_Union/510.california.prisoner.vol19.no2.June1991.pdf).

<sup>204</sup> I count sixteen such cases, collected at <http://www.clearinghouse.net/results.php?searchAttyOrg=19>.

<sup>205</sup> For a collection of California jail decrees with population orders, see *California Jail Population Caps*, THE CIVIL RIGHTS LITIGATION CLEARINGHOUSE, <http://www.clearinghouse.net/results.php?searchSpecialCollection=14>. For sources, see Technical Appendix, *supra* note 176.

<sup>206</sup> Mostly, the cases settled. As prisoners' lawyer Paul Comiskey explained: "It would turn out to be a collaborative thing. The sheriff saw the lawsuit as a vehicle to get money from the Board of Supervisors. And the sheriffs saw that the population limit would help them keep control over their jail. We always put limits. Sometimes there was a kick-out order; within 90% of capacity you may, and at 100% you must, kick people out. So the sheriffs ended up pretty happy." Interview with Paul Comiskey, *supra* note 13.

resources. From that moment on, John was my best friend.”<sup>207</sup> At least one case was actually brought by the sheriff against the Board of Supervisors, with no prisoner plaintiffs at all.<sup>208</sup>

In California, what emerged from these jail conditions cases was both the population orders themselves, and, perhaps even more important, a guiding principle for California’s jail population — a rule of thumb for population control of “one prisoner, one bed” or, in an alternative phrase, “no floor-sleepers.”<sup>209</sup> The clearest statement of this principle was written by Judge William P. Gray in the long-lived Orange County jail conditions case, *Stewart v. Gates*.<sup>210</sup> After a jail visit in which Judge Gray observed “several instances in which an inmate was sleeping on his assigned mattress that had been placed directly on the concrete floor of a cell, immediately adjacent to the toilet, because all of the bunks were allotted to other prisoners,” he wrote: “If the public, through its judicial and penal system, finds it necessary to incarcerate a person, basic concepts of decency, as well as reasonable respect for constitutional rights, require that he be provided a bed.”<sup>211</sup> Judge Gray ordered that “every prisoner kept in the jail will be accorded a mattress and a bed or bunk upon which to sleep.”<sup>212</sup> Several years later, in the face of a rapidly increasing jail (and county) population, the court found the sheriff in contempt of court and fined him, in his official capacity, \$50,000 plus \$10 per night “for every inmate who does not have a bed or bunk on which to sleep the first night.”<sup>213</sup> A population cap set at the rated capacity of the men’s main jail was imposed in the case in the 1980s (and lasted until 2005).<sup>214</sup> In addition, “faced with the possibility the ACLU might seek to expand the federal class action to all three county facilities, [Sheriff Gates] put a voluntary cap on the number of inmates at the two other locations, so each inmate there would have a bed or a bunk as well.”<sup>215</sup>

As an ironclad constitutional principle, one-prisoner-one-bed is a little bit challenging (though far from impossible) to square with *Rhodes v. Chapman*.<sup>216</sup> In that case, the Supreme Court insisted that crowding alone — in particular, double celling (housing two prisoners in a cell meant for one by

<sup>207</sup> Interview with Bill Crout, *supra* note 13. Switching sides, John Hagar represented many of the sheriffs in the 1990s wave of litigation. He says that in most of those cases, he would tour a crowded jail, advise the sheriff that he could not defend it, and then negotiate a population cap. Interview with John Hagar, *supra* note 13.

<sup>208</sup> See *Marvin v. Cnty. of Kings*, No. 01-c-0040 (Cal. Super. Ct. filed Jan. 4, 2001), available at <http://www.clearinghouse.net/detail.php?id=12259>.

<sup>209</sup> See, e.g., Interview with Richard Herman, *supra* note 13; Interview with Paul Comiskey, *supra* note 13 (“The big no-no was sleeping on the floor.”); see also *Redman v. Cnty. of San Diego*, 942 F.2d 1435, 1444 n.12 (9th Cir. 1991) (“Sergeant Canfield further testified that in his opinion, the detention facility was overcrowded only if there were ‘floor-sleepers.’”).

<sup>210</sup> 450 F. Supp. 583 (C.D. Cal. 1978).

<sup>211</sup> *Id.* at 588.

<sup>212</sup> *Id.* at 590.

<sup>213</sup> *Gates v. Mun. Court*, 9 Cal. App. 4th 45, 49 (Cal. Ct. App. 1992).

<sup>214</sup> See *Pierce v. Cnty. of Orange*, 526 F.3d 1190, 1196 (9th Cir. 2008).

<sup>215</sup> *Gates*, 9 Cal. App. 4th at 50.

<sup>216</sup> 452 U.S. 337 (1981).

substituting a bunk bed for the planned single bed) — did not constitute cruel and unusual punishment.<sup>217</sup> “[D]eprivations of essential food, medical care or sanitation,” “increase[d] violence,” or other “intolerable” conditions were, rather, what the Constitution forbids.<sup>218</sup> *Rhodes* undermines the authority of rules of thumb, despite their usefulness to government managers; in *Rhodes*, the Supreme Court was trying to insist on fact-specificity and nuance about the consequences of violating such rules. Even so, California criminal justice actors have long widely believed that the federal courts will enforce the no-floor-sleepers approach against jails; the Ninth Circuit has sometimes, if not always, confirmed this belief.<sup>219</sup>

Moreover, as consent decrees often do, California’s jail decrees had a strong influence on the development of professional norms and standards.<sup>220</sup> In response to the litigation threat, sheriffs wanted the protection of formal bureaucratic procedures and professional ratification.<sup>221</sup> Statewide jail standards, promulgated as regulations,<sup>222</sup> were the result. They have no explicit population requirements, but their rules about square footage, bedding, etc., mean that California’s jails are to hold only as many prisoners as they can reasonably house.<sup>223</sup> Even though the regulations are not enforceable, observers agree that jails work very hard to adhere to at least the population-related standards; floor-sleepers have become rare in California’s jails.<sup>224</sup>

<sup>217</sup> *Id.* at 348.

<sup>218</sup> *Id.*; see also *Bell v. Wolfish*, 441 U.S. 520, 554 (1979); *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1992).

<sup>219</sup> See *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1448 (9th Cir. 1989) (“Thompson’s uncontroverted allegation that he was provided with neither a bed nor even a mattress [on two nights in jail] unquestionably constitutes a cognizable Fourteenth Amendment claim.”); see also *Rhinehart v. Pima Cnty. Jail*, No. 92-15488, 1992 WL 387170, at \*1 (9th Cir. 1992) (unpublished table opinion). For a long list of non-California cases holding it unconstitutional, and a shorter list holding it constitutional, to assign jail prisoners to sleep on the floor, see JOHN BOSTON & DANIEL MANVILLE, *PRISONERS’ SELF-HELP LITIGATION MANUAL* 20–21 nn.114–18 (2010).

<sup>220</sup> Interview with John Hagar, *supra* note 13; Interview with Gary Wion, *supra* note 13; cf. Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, in *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 63, 69–70 (Paul J. DiMaggio & Walter W. Powell eds., 1991) (originally published at 48 *AM. SOC. REV.* 147 (1983)) (identifying several kinds of institutional imitation, including a “mimetic” or “modeling” process that occurs “when organizational technologies are poorly understood, when goals are ambiguous, or when the environment creates symbolic uncertainty”).

<sup>221</sup> Interview with Gary Wion, *supra* note 13; see also Schlanger, *Civil Rights Injunctions Over Time*, *supra* note 17, at 563.

<sup>222</sup> CAL. CODE REGS. tit. 15, § 1280 (2012); CAL. CODE REGS. tit. 24, §§ 13-102, 1231 (2012).

<sup>223</sup> See CAL. BD. OF STATE & CMTY. CORR., *MINIMUM STANDARDS FOR LOCAL DETENTION FACILITIES*, TITLE 24, available at [http://www.bdcort.ca.gov/regulations/2001\\_regulations\\_guidelines/t\\_15\\_24\\_2001/t\\_24\\_adult/pdf\\_version/t\\_24\\_adult\\_01.pdf](http://www.bdcort.ca.gov/regulations/2001_regulations_guidelines/t_15_24_2001/t_24_adult/pdf_version/t_24_adult_01.pdf).

<sup>224</sup> Interview with Paul Comiskey, *supra* note 13; Interview with Peter Eliasberg, *supra* note 13; Interview with John Hagar, *supra* note 13; Interview with Gary Wion, *supra* note 13.

### B. Implementation of the One-Prisoner-One-Bed Rule

California's jails have not been nearly as crowded as its prisons. In fact, in recent years, their populations have only occasionally exceeded rated capacity<sup>225</sup> (although 10 or 15% over capacity is far from unheard of). How have the jails avoided the state prisons' peak crowding rate of 200% of design capacity? Or, alternatively put, how have California's jails complied with their court orders and with the one-prisoner-one-bed approach? Using the same categories as in the section above regarding counties and realignment, logically, there have been three methods: expansion, limiting admissions or sentences, and releasing prisoners.

*Expansion:* A logically straightforward, but practically difficult, way to deal with crowding (given a one-prisoner-one-bed rule) is simply to add beds. This has been the prison system's approach, as illustrated by the photograph in the Introduction, *supra*. But in some ways, jails' population problems are more acute than prisons', because jails often do not have the kinds of congregate spaces that California's prisons have used as temporary dorms, and therefore have fewer options for overflow housing. They do sometimes figure out a way,<sup>226</sup> but more typically, when jails get very crowded, prisoners tend to sleep on benches in what were intended to be reception areas or, more often, on the floor. This is precisely what a one-prisoner-one-bed rule forbids.

Building is a straightforward, albeit an expensive and time consuming, option. Until A.B. 900, in 2007, gave counties access to bond financing for jail building, for over a decade California's sheriffs had had extremely limited ability to build jail bed space. Whether because of voters' unwillingness to fund further jail expansion after the jail building boom of the 1980s, or their disinclination to add detention facilities in their neighborhoods, jail capacity has gone up only 10% since 1990 (from 70,000<sup>227</sup> that year to 77,271<sup>228</sup> currently). California's rated prison capacity has grown at nearly six times that rate, from 52,698 to 84,130 over the same period.<sup>229</sup> The typi-

---

<sup>225</sup> See MIKE MALES, CTR. ON JUVENILE & CRIMINAL JUSTICE, CAN CALIFORNIA COUNTY JAILS ABSORB LOW-LEVEL STATE PRISONERS 2 TBL.1, 3 TBL.2 (MAR. 2011), available at [http://www.cjcb.org/files/Can\\_California\\_County\\_Jails\\_Absorb\\_Low-Level\\_State\\_Prisoners.pdf](http://www.cjcb.org/files/Can_California_County_Jails_Absorb_Low-Level_State_Prisoners.pdf).

<sup>226</sup> See Hope Hanselman, *San Luis Obispo County Jail Works to Relieve Jail Overcrowding*, KSBY, May 18, 2012, <http://www.ksby.com/news/san-luis-obispo-county-jail-works-to-relieve-jail-overcrowding>.

<sup>227</sup> CAL. BD. OF CORR. AND REHAB., 1999 JAIL PROFILE SURVEY, AVERAGE DAILY POPULATION (1999), available at [http://www.bdcort.ca.gov/fsod/jai%20profile%20summary/jps\\_annual\\_rep\\_99/average\\_daily\\_population.html](http://www.bdcort.ca.gov/fsod/jai%20profile%20summary/jps_annual_rep_99/average_daily_population.html).

<sup>228</sup> CAL. BD. OF STATE & CMTY. CORR., JAIL SURVEY SPREADSHEET, 2009-2011 Partial 2012 (Nov. 15, 2012) (on file with author).

<sup>229</sup> Compare CAL. DEP'T OF CORR. AND REHAB., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT DECEMBER 31, 1995 (Jan. 4, 1996), available at [http://www.cdcr.ca.gov/reports\\_research/Offender\\_Information\\_Services\\_Branch/Monthly/TPOP1A/TPOP1Ad9512.pdf](http://www.cdcr.ca.gov/reports_research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad9512.pdf) with CAL. DEP'T OF CORR. AND REHAB., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT OCTOBER 31, 2012 (Nov. 5, 2012), available at [http://www.cdcr.ca.gov/reports\\_research/Offender\\_Information\\_Services\\_Branch/Monthly/TPOP1A/TPOP1Ad1210.pdf](http://www.cdcr.ca.gov/reports_research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad1210.pdf).



cal budget issues in times of fiscal constraint are exacerbated by the division of responsibility between sheriffs, who run the jails, and county boards of supervisors, who fund them but do not otherwise control them.<sup>230</sup>

*Limiting admissions and sentences:* Admitting fewer prisoners to jail or admitting prisoners for less time obviously reduces crowding. Ordinarily, this depends on judges' acquiescence, using adjustments to bail, diversion, or sentencing. The politics here are not easy. California's municipal and superior court judges, who are elected, frequently want to insure that prisoners are not released. And sheriffs share that law-and-order orientation: To quote one senior sheriff's department officer, a deputy chief from San Bernardino County, "We didn't get into the business in order to find ways to release people. . . . We are in the business of figuring out how to arrest, convict and keep people in jail . . . ." <sup>231</sup> Still, sheriffs are simultaneously responsible for maintaining jail conditions and organizationally liable for failures in that responsibility. So sheriffs are more likely than judges to want to ease up on bail or sentencing — especially if they can pin responsibility for that decision on someone else. Sheriffs who have good understandings with their county judges can ask them to ease bonding requirements (especially greater use of release on recognizance, rather than money bond), shorten misdemeanor sentences, or make other types of accommodations.<sup>232</sup> In combination, such measures can help control population.

Often, however, judicial accommodations are not forthcoming. In Santa Clara County, for example, when county jails were the subject of a late 1980s state court consent decree that included a population cap, in *Branson v. Winter*,<sup>233</sup> the sheriff's captain who ran Santa Clara's jail "found himself in constant conflict with the courts because he had to release 'hundreds of inmates . . . for no other reason than we didn't have a bed to put them in.'" <sup>234</sup> One way this was done was through a sheriff-implemented bail reform: instead of admitting anyone whose bail had been set at some specified low level, the sherriff released such potential prisoners on their own recognizance. When the recognizance point was set at \$1,000 or less, the state criminal judges would, according to the jail captain's testimony years later, "start setting bail . . . at twelve hundred." The effect was iterative: "I recall

---

<sup>230</sup> See, e.g., *Cnty. of Butte v. Superior Court*, 176 Cal. App. 3d 693, 695 (1985).

<sup>231</sup> Flaccus, *supra* note 174.

<sup>232</sup> See, e.g., Brian Bullock, *Santa Barbara, San Luis Obispo County Jails Feeling Effects of AB 109*, LOMPOC RECORD, May 22, 2012, [http://www.lompocrecord.com/news/local/govt-and-politics/santa-barbara-san-luis-obispo-county-jails-feeling-effects-of/article\\_2ad5752e-a3d5-11e1-8acb-0019bb2963f4.html](http://www.lompocrecord.com/news/local/govt-and-politics/santa-barbara-san-luis-obispo-county-jails-feeling-effects-of/article_2ad5752e-a3d5-11e1-8acb-0019bb2963f4.html).

<sup>233</sup> No. 78807 (Cal. Super. Ct., filed Mar. 27, 1981), available at <http://www.clearinghouse.net/detail.php?id=45>; see also *Fisher v. Winter*, 564 F. Supp. 281, 300 (N.D. Cal. 1983) (governing women's jail and requiring that no prisoner be assigned to sleep on the floor).

<sup>234</sup> See *People ex rel. Deputy Sheriffs' Ass'n v. Cnty. of Santa Clara*, 49 Cal. App. 4th 1471, 1485 (1996).

when we set it at twenty-five hundred dollars, we started getting bail amounts of twenty-five hundred and one."<sup>235</sup>

*Prisoner releases:* The final and, in California, seemingly the most important method of jail population control is simply releasing prisoners — pretrial and sentenced. Unlike the *Plata/Coleman* population order, under which no California prisoner has been or will be released early, jail orders are cited, monthly, to justify the early release of thousands of pretrial and sentenced prisoners from county jails. As Figure 2, below, shows, the peak of releases took place in 1996, when jails released over 27,000 prisoners per month; during a second peak, in 2005, releases averaged about 20,000 per month. In 2011, releases averaged about 10,000 per month, and preliminary information suggests they may be trending up again in 2012.<sup>236</sup> California has not seen the type of “third-wave” bail reform<sup>237</sup> that a few jurisdictions have implemented, which holds down bail requirements to avoid incarceration based on inability to pay, rather than risk of flight or to public safety.<sup>238</sup> And, as noted in section II.D, *supra*, pretrial detainees in California constitute over 70% of the state’s jail population, well above the national average of 60%, which is itself extremely high by comparison with historical figures.<sup>239</sup> Pretrial releases are basically an ad hoc, county-by-county bail reform method; prisoners who have been given low bails that they nonetheless cannot meet because of their financial circumstances are released anyway. Releases of sentenced prisoners function a little differently; they tend to mean that nonviolent misdemeanants do very little time. (Realignment newly empowers sheriffs to release not only misdemeanants<sup>240</sup> but also the

<sup>235</sup> *Id.*

<sup>236</sup> For full data on jail prisoner releases, see Technical Appendix, *supra* note 176. For more discussion of preliminary 2012 trends, see *infra* Table 3, which is derived from the California Board of State and Community Corrections jail surveys.

<sup>237</sup> The first wave, in the 1960s, sought to end arbitrary pretrial detention, with its resulting high rate of pretrial incarceration for poor defendants in urban jails. The second wave, beginning in the 1970s, introduced formal determinations of future dangerousness into the calculus. Like other observers, I label the most recent set of reforms a third wave. See Timothy R. Schnacke et al., *The Third Generation of Bail Reform*, DENV. U. L. REV. ONLINE (Mar. 14, 2011), <http://www.denverlawreview.org/online-articles/2011/3/14/the-third-generation-of-bail-reform.html>. For documentation of the current state of the debate, see OFFICE OF JUSTICE PROGRAMS AND THE PRETRIAL JUSTICE INST., NAT’L SYMPOSIUM ON PRETRIAL JUSTICE: SUMMARY REPORT OF PROCEEDINGS 14–17 (2011), available at <http://www.pretrial.org/NSPJ%20Report%202011.pdf>.

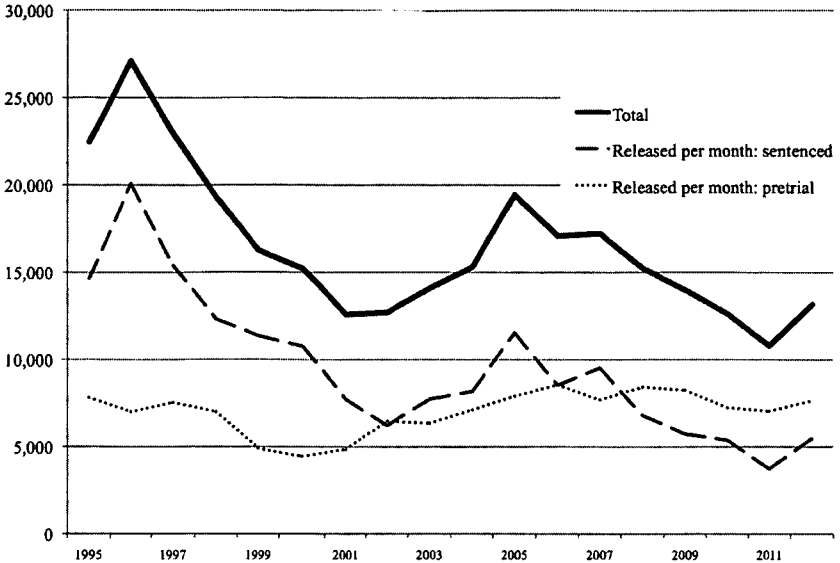
<sup>238</sup> For description of the situation in California and of a bail reform bill currently under consideration, see BRIAN HELLER DE LEON, CTR. ON JUVENILE & CRIMINAL JUSTICE, TESTIMONY TO THE CALIFORNIA LEGISLATURE (Apr. 24, 2012), available at [http://sjsjusticestudies.net/wp-content/uploads/2012/05/SB-1180-Pretrial-Testimony\\_Final1.pdf](http://sjsjusticestudies.net/wp-content/uploads/2012/05/SB-1180-Pretrial-Testimony_Final1.pdf).

<sup>239</sup> See Technical Appendix, *supra* note 176; OFFICE OF JUSTICE PROGRAMS, *supra* note 237, at 11–12 (charts submitted by James Austin).

<sup>240</sup> Misdemeanor charges tend to be low profile, so early releases of misdemeanants are not very politically visible (unless the misdemeanant is someone like Lindsay Lohan, see Ken Lee, *Lindsay Lohan Released From Jail*, PEOPLE MAG., Aug. 2, 2010; Ken Lee, *Lindsay Lohan Checks In and Out of Jail*, PEOPLE MAG., Nov. 7, 2011, <http://www.people.com/people/article/0,,20543204,00.html>).

non-non-non felons, but presumably these latter offenders will continue to do more time.)

FIGURE 2: CALIFORNIA JAIL RELEASES PER MONTH, 1995–2012



Source: Cal. Bd. of State and Cmty. Corr., see Technical Appendix, *supra* note 176.

Table 2 provides more detail for recent years. In each year shown in Table 2, releases have totaled between 11 and 14% of admissions. Each year, a majority have occurred pretrial.

TABLE 2: MONTHLY PRISONER RELEASES FROM CALIFORNIA JAILS

Year	Prisoner releases per month					
	(a) Booked per month	(b) Total	(c) Pretrial prisoners	(d) No court-ordered cap (% of pretrial)	(e) Sentenced prisoners	(f) No court-ordered cap (% of sentenced)
2008	107,042	15,294	8,332	4%	6,962	12%
2009	101,153	14,465	8,199	4%	6,266	15%
2010	96,391	11,950	6,987	5%	4,963	7%
2011	88,551	10,196	6,649	7%	3,547	14%

Source: See Cal. Bd. of State and Cmty. Corr.<sup>241</sup>

<sup>241</sup> See *supra* note 228. For Table 2, I adjusted the data to reflect that Orange County in 2008 and 2009, and Shasta and Plumas Counties for the entire period, had court-ordered population caps.

The result of releases can be explicit confrontation: Again, in Santa Clara, where *Branson v. Winter*'s 1981 decree included a population order, the sheriff's captain

was called into the chambers of the presiding judge who was upset over the number of release orders he was asked to approve, and he said he was very concerned about the release, didn't want it to happen. And I said, well, I don't really have a choice. And he says, well, I don't want them released. And I said, well, are you saying that you're now going to take over the *Branson* case? He said no. I said, well, then I'm going to release them. If you want to hold me in contempt, please do so, we'll go to court. But I have no choice.<sup>242</sup>

The Santa Clara judge did not proceed with a contempt charge, but if he had, this medium-grade conflict might have escalated considerably, to all-out war. One war along these lines that occurred twenty years ago remains salient among California's sheriffs, county counsels, and other criminal justice actors. In Orange County in the early 1990s, Sheriff Brad Gates (having already been held in contempt several years before in federal district court for failing to provide beds for jail prisoners) was nearly whipsawed by contempt sanctions imposed by the Central Orange County Municipal Court for releasing eighteen prisoners not ordinarily eligible under California law for release on a citation following arrest,<sup>243</sup> in violation of routine individual orders assigning the particular criminal defendants to the sheriff's custody. The municipal court not only fined Sheriff Gates \$17,000, it sentenced him to thirty days confinement in his own jail. The municipal court's presiding judge explained that he needed "to protect now the ability of the Court to enforce its own orders," and that his court had the "inherent power to coerce other branches to give it the ability to enforce its orders." Reviewing the contempt convictions, the superior court vacated them; this view was upheld by the court of appeal.<sup>244</sup>

Things got similarly heated recently in Fresno, when, in 2010, Sheriff Margaret Mims shut down three floors of the county jail, substantially reducing capacity, because her budget would not allow her to staff both the jail and patrol. The Board of Supervisors refused to allocate any additional funds and ordered her office to restore the jail staff; unable to resolve the issue, she sued in state court and won a preliminary injunction, enabling her to carry out the layoffs.<sup>245</sup> The lawsuit has stretched on ever since, and the resultant bad blood has had significant effects — for example, prompting the

---

<sup>242</sup> *People ex rel. Deputy Sheriffs' Ass'n v. Cnty. of Santa Clara*, 49 Cal. App. 4th 1471, 1485 (1996).

<sup>243</sup> See CAL. PENAL CODE § 827.1 (West 2010).

<sup>244</sup> *Gates v. Mun. Court of Orange Cnty.*, 9 Cal. App. 4th 45, 51 (1992).

<sup>245</sup> Theresa Freed, *Legal Victory for Sheriff Margaret Mims*, KSEE24 NEWS, July 30, 2010, <http://www.ksee24.com/news/local/89738517.html>. See also *Mims v. Cnty. of Fresno Bd. of*

county's Community Corrections Partnership (which is responsible for allocating realignment money) publicly to consider funding a facility other than the county jail in order to gain more control over early releases.<sup>246</sup> As the *Fresno Bee* described, "The infighting has . . . hamstrung the ability of local leaders to work collaboratively on law-enforcement issues, such as jail overcrowding and early releases of inmates."<sup>247</sup>

Other times the state courts themselves implement releases.<sup>248</sup> In Orange County, the California State Court of Appeal, after roundly criticizing the municipal court for holding the sheriff in contempt for conduct induced by federal law and a federal court order, praised the superior court's presiding judge, "who has continually cooperated with the sheriff and issued appropriate orders authorizing release of prisoners when necessary."<sup>249</sup> Whether judges will cooperate with sheriffs in prisoner releases turns on factors ranging from personal relationships, to, for example, the conservatism or liberalism of the electorate or the sheriff's popularity.

The authorizing source of law for jail prisoner releases varies. Sometimes the answer is a state or federal court order from a civil rights case.<sup>250</sup> But the one-prisoner-one-bed approach, attributed as it is to federal law, empowers sheriffs even without a court order. As the California Court of Appeals held in 1998, about Orange County's Sheriff Gates,

If it was unconstitutional to force inmates in the men's main jail to sleep on the floor, a reasonable person would conclude it was also unconstitutional at the two other facilities, even if a federal court had not yet said so in a formal order. It is regrettable conditions in the main jail deteriorated to a point of warranting federal intervention. It would be more regrettable if we compounded the problem by holding that Gates should manage branch jails in a way he could not lawfully manage the main jail.<sup>251</sup>

Table 2's columns (d) and (f) show the proportion of released prisoners who are *not* affected by a court order. (That is, the prisoners referenced in

Supervisors, No. 10CEC00528 (Cal. Super. Ct. filed Feb. 11, 2010), available at <http://www.clearinghouse.net/detail.php?id=12226>.

<sup>246</sup> See Kurtis Alexander, *Fresno Jail May Not Get Funds as Panel Looks at Coalinga Facility*, *FRESNO BEE*, May 14, 2012, at A1.; Kurtis Alexander, *Funds OK'd to Open Floor in Fresno County Jail*, *FRESNO BEE*, May 25, 2012, at A3.

<sup>247</sup> Kurtis Alexander, *Sheriff Mims' lawsuit costing Fresno County \$450,000*, *FRESNO BEE*, May 10, 2012, at A1.

<sup>248</sup> See, e.g., CAL. PENAL CODE § 4024.1 (West 2012) (providing for sheriff application to the superior court presiding judge to receive authorization for early releases for thirty days at a time, and detailing how such releases should proceed).

<sup>249</sup> *Gates*, 9 Cal. App. 4th at 59 n.11.

<sup>250</sup> See, e.g., Letter from San Diego Cnty. Sheriff William B. Kolender to Susan Hubbard, Dir., Div. of Adult Inst., Cal. Dep't of Corr. and Rehab. (May 5, 2009), available at [http://acreenry.org/wp-content/uploads/2009/07/letter-from-san-diego-sheriff\\_050509.pdf](http://acreenry.org/wp-content/uploads/2009/07/letter-from-san-diego-sheriff_050509.pdf). For information on *Hudler v. Duffy*, No. 404148 (Cal. Super. Ct., filed 1977), see <http://www.clearinghouse.net/detail.php?id=46>.

<sup>251</sup> *Gates*, 9 Cal. App. 4th at 55.

columns (d) and (f) have been released from jails in which no court order is extant.) While a large majority of releases have been undertaken pursuant to judicially ratified population caps, 5 to 7% of the pretrial prisoner releases and 7 to 15% of the sentenced prisoner releases occurred in jurisdictions with no known relevant court order. While thirty-eight of California's fifty-eight counties report that limited capacity has forced them to release prisoners at some point in the past several years,<sup>252</sup> only a small majority of these have a court order to point to. It turns out not to make all that much difference, legally, whether a court order exists or not. California has a formal county parole system,<sup>253</sup> but even wholly apart from that, California sheriffs have successfully asserted the authority to implement release policies on their own, and the standards used for release may, as they were in Santa Clara County during the conflict described above, be "far more lenient than the standards of the county board of parole."<sup>254</sup>

Thus, the difference between having a court order and not having one is largely political rather than legal. Before realignment, Dick Herman, one of the lawyers who litigated the 1990s wave of jail court orders, explains, "the smart counties kept the population caps, so the sheriff could say, 'the federal judge made me release these prisoners.'" Asked whether things are changing because of realignment, his answer is that sheriff discretion may have expanded, but the politics of prisoner-release orders remain perilous: "Now, counties that chafe under federal orders can get rid of them. Realignment has, they think, given them authority to release everyone. . . . They don't need the court-ordered caps anymore." Even so, he continues, there remains a reason to keep court orders in place: "If they blame the releases on realignment, the judges will go to the legislature,"<sup>255</sup> which might well then legislate away the sheriffs' discretion.

But what about realignment? Table 2 showed that releases were down in 2011. But Table 3 presents the partial four months of data available post-realignment (2012, quarter 1); these data suggest the picture may be changing.

---

<sup>252</sup> See Technical Appendix, *supra* note 176, for a county-by-county breakdown. My tally is based on tabulated releases since 2008. See CAL. BD. OF STATE & CMTY. CORR., *supra* note 228.

<sup>253</sup> CAL. PENAL CODE §§ 3074–89 (West 2010).

<sup>254</sup> *People ex rel. Deputy Sheriffs' Ass'n v. Cnty. of Santa Clara*, 49 Cal. App. 4th 1471, 1485 (1996).

<sup>255</sup> Interview with Richard Herman, *supra* note 13.

TABLE 3: POPULATION RELEASES IN 2012  
(PARTIAL DATA: SOME JAILS ONLY)

	(a) Est. % of Jail Population Reporting	(b) Population related releases/month			(c) % increase, compared to the same jails in 2011		
		Total	Pretrial	Early	Total	Pretrial	Early
Jan.	72%	9,248	5,798	3,450	21%	5.2%	38.4%
Feb.	66%	5,645	2,759	2,886	38%	10.6%	43.4%
Mar.	60%	5,868	2,745	3,123	44%	17.8%	42.2%
Apr.	34%	3,264	2,063	1,201	25%	1.0%	53.0%

Source: Technical Appendix, *supra* note 176 (presenting updated data).

The data are partial; the fraction of jail population held by counties that have so far reported is listed by month in column (a). The crucial columns are the last three, labeled (c); they are based on a comparison of releases by the counties that have so far reported 2012 releases to releases in those same counties in the same month, one year earlier. As Table 3 shows, for counties that have so far provided data, releases are up considerably compared to 2011 — although still nowhere near the peak that occurred in 2007. The effects are beginning to attract media notice.<sup>256</sup>

#### IV. CONCLUSION: THE HYDRA THREAT AND JAIL LITIGATION

I will conclude with some speculations about what happens next: I think the answer is jail litigation. 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 fifty-eight counties to, in turn, develop unconstitutional conditions of jail confinement. I do not mean this metaphor to denigrate what seems to me to be the substantial civil rights achievements of *Plata* and *Coleman*. The hydra's new heads are likely to threaten the welfare of fewer prisoners, or threaten them less, than the old one did. But the hydra problem remains important.

Lead plaintiffs' counsel in *Plata*, Don Specter, says that this risk is very real: "In some ways, realignment has done what the sheriffs feared: moving

<sup>256</sup> See, e.g., Bullock, *supra* note 232 (describing increase in early releases and electronic monitoring in San Luis Obispo and Santa Barbara).

problems from the prisons to the jails. Especially health care.”<sup>257</sup> The jail situation is worsened, moreover, by the fact that jail policies and practices are generally geared towards short-term stays, but realignment will push more long-term prisoners into county jails. For such longer-term prisoners, county time may feel worse than state time: to quote my own prior gross generalizations, “jails are more dangerous than prisons” as well as “more chaotic”; “jail routines are less regular, jail time is more idle, and jail inmates are more likely to be in some kind of crisis.”<sup>258</sup> Sheriffs’ lobbyist Nick Warner says that there are now dozens of jail prisoners sentenced to more than ten years of county time. “Think about the inmates,” he says. “We don’t have yard space for these people. We don’t have medical, mental health, recreation.” The potential for disaster is very present: Speaking of his sheriff clients, Warner continues, “We said we’re willing to be part of the solution, but we’re not set up for this. We aren’t good places for people to spend so much time in.”<sup>259</sup>

The challenges are both regulatory and informational. In terms of regulation, the statewide jail standards have some influence, but (as discussed in section III.A) they are hortatory. And even if followed to the letter, they are part of a jail environment that is set up for short-term prisoners. (To cite just one of many possible examples, California jail regulations require just three hours per week of access to exercise space,<sup>260</sup> in which large-muscle activity is possible; this is, to my mind, too limited even for short-term prisoners, but for long-term stays, it is well below what even state prisoners in punitive segregation, much less in general population, typically receive.) Other soft regulatory methods — data collection, sharing of best practices, and the like — are essentially unfunded and therefore unavailable.<sup>261</sup> In terms of current information, Barry Krisberg explains that local control and jail dispersal augment the challenge:

It’s kind of hard to get your arms around what’s really going on. . . . There is no body, no structure, no entity that has any way to know what’s going on at the county level.<sup>262</sup>

So how can the hydra problem be minimized? Three answers seem to be emerging in California: expansion, decarceration, and litigation. This

<sup>257</sup> Interview with Don Specter, *supra* note 13.

<sup>258</sup> See Schlanger, *Inmate Litigation*, *supra* note 25, at 1686–87.

<sup>259</sup> Interview with Nick Warner, *supra* note 13.

<sup>260</sup> See CAL. CODE REGS. tit. 15, § 1006 (2012) (defining “exercise” to mean “physical exertion of large muscle groups”); *id.* at § 1065 (requiring minimum of three hours of exercise distributed over seven days).

<sup>261</sup> Interview with Michael Bien, *supra* note 13. As Anjuli Verma pointed out to me, however, there are ongoing efforts to collect and standardize county data relevant to realignment through the Board of State Community Corrections, California State Association of Counties, and the Chief Probation Officers of California (CPOC), as well as through a non-profit group called California Forward. It is possible some of these will make headway.

<sup>262</sup> Interview with Barry Krisberg, *supra* note 13.



Article has already discussed at some length current hints of a new jail building boom. And I have discussed, as well, the one-prisoner-one-bed rule, population caps, and the resulting decarceration techniques. Ideally, these techniques would have a foundation in some kind of evidence-based classification instrument. Michael Bien describes this as “a real opportunity to do criminal justice reform, with a side benefit of improving conditions of confinement.”<sup>263</sup>

Another response is also emerging: litigation, which Part III, above, demonstrates functions as a routine and ever-present part of the California criminal justice ecosystem. Corrections Secretary Matt Cate says, for example, that he is confident that given their flexibility and their new realignment money, most counties will be able “to handle those challenges if not more effectively than the state, at least more quickly.” But, he continues: “If it’s alleged that treatment of inmates is so poor as to violate the Constitution, I have no doubt that the plaintiffs’ bar will zealously advocate to get those violations addressed.”<sup>264</sup>

But of course litigation fixes are not so easy, in jail as elsewhere. California jail litigation is unfolding in three arenas: new jail litigation, existing prison litigation, and existing jail litigation:

*New jail litigation:* All observers project that new jail litigation will increase as realignment matures. Barry Krisberg, for example, says that given poor jail conditions, “lawsuits are inevitable, and the counties kind of know it; they are expecting for the shoe to drop on this stuff.”<sup>265</sup> But in some ways, jail litigation is even more difficult than prison litigation — not only are jails, like prisons, hidden behind their walls, but jails are much more dispersed than prisons. California has fifty-eight counties, many with multiple jails, and each with its own practices, compared to its thirty-three state prisons, run by one agency, with one budget and one set of rules. I do not mean to exaggerate this effect: as in most states, California’s jail population is concentrated in a few large counties (80% of the state’s jail capacity is in fifteen counties).<sup>266</sup> But even so, jail dispersal strains the bar’s capacity to bring jail cases.

At one time, legal services lawyers were effective jail litigators; they were as dispersed as jails, and they had deep connections with the communities that send prisoners to jail. But those days vanished in the 1980s when Congress banned groups that accept Legal Services Corporation funding from representing prisoners.<sup>267</sup> It is hard for other civil rights lawyers even to know what goes on in the jails in fifty-eight counties, much less to sue them all. Still, the ACLU of Southern California has over the past several years substantially increased its work on jail conditions in Los Angeles —

---

<sup>263</sup> Interview with Michael Bien, *supra* note 13.

<sup>264</sup> *Id.*

<sup>265</sup> Interview with Barry Krisberg, *supra* note 13.

<sup>266</sup> CAL. BD. OF STATE & CMTY. CORR., *supra* note 228.

<sup>267</sup> See Schlanger, *Beyond the Hero Judge*, *supra* note 17, at 2019.

the nation's largest jail system — not only in its longstanding crowding litigation, *Rutherford v. Block*, but also in two new class action lawsuits dealing with violence and disability discrimination.<sup>268</sup> And, in what is likely a sign of things to come, the Prison Law Office has just filed its first jail case in many years, in Fresno. The complaint alleges life-threatening failures to provide medical and mental health care, and to protect prisoners who are ill or have disabilities from harm by other prisoners.<sup>269</sup> That is, it makes allegations that echo the subject matter of *Plata*, *Coleman*, and *Armstrong*, but this time just in Fresno County.

It is worth emphasizing that new jail litigation is far less likely than prior cases to lead new population orders. The PLRA's provisions — the procedural requirement of a three-judge court and of failed nonpopulation orders as a precedent; the broad intervention rules; the difficulty of settling without a concession of liability, etc. — make the one-prisoner-one-bed approach difficult to enforce in federal court. As Bill Crout explains: "The PLRA has shackled litigation, including litigation that would be very welcome to sheriffs themselves."<sup>270</sup>

So the Los Angeles and Fresno cases and others like them are likely to focus on improving conditions, rather than decarceration. This will substantially change litigation dynamics because sheriffs will gain less and lose more from litigation — they will not be able to attribute prisoner releases to court orders, and compliance with any remedial orders will take time, money, and effort. Still, this is a pattern familiar from all the states that have seen less jail population regulation than California. Assuming that such cases are strong (as I do assume in both litigations — class counsel are excellent and experienced lawyers who are unlikely to be wasting their own time with weak cases), there remain reasons to settle and promising remedial approaches.

*Existing prison litigation:* As jails become even more consequential — and more crowded — criminal justice sites, California's existing prison litigation could in various ways expand to encompass jails. So far, nobody is arguing that the actual substantive provisions of the *Coleman* and *Plata* orders will apply to the jails as they admit people who used to be state prisoners. This approach would not, however, be unprecedented. *Plata's* substantive orders continue to protect California prisoners who have been

---

<sup>268</sup> Interview with Peter Eliasberg, *supra* note 13. See *Rutherford v. Block*, No. 75-cv-04111 (C.D. Cal. filed Feb. 9, 1975), available at <http://www.clearinghouse.net/detail.php?id=5500>; see also *Rosas v. Baca*, No. 12-cv-00428 (C.D. Cal. filed Jan. 18, 2012) (violence), available at <http://www.clearinghouse.net/detail.php?id=12126>; *Johnson v. L.A. Cnty. Sheriff's Dep't*, No. 08-cv-03515 (C.D. Cal. filed May 29, 2008) (disability), available at <http://www.clearinghouse.net/detail.php?id=10962>.

<sup>269</sup> See *Hall v. Mims*, No. 11-cv-02047 (E.D. Cal. filed Dec. 13, 2011), available at <http://www.clearinghouse.net/detail.php?id=11682>.

<sup>270</sup> Interview with Bill Crout, *supra* note 13.

sent out-of-state.<sup>271</sup> And Judge Wilken has held, in an order in *Armstrong* currently on appeal, that the State remains responsible for compliance with the case's disability-related remedial orders when the State uses jail facilities to house prisoners awaiting parole-revocation hearings.<sup>272</sup> The difference is that the realigned county prisoners are serving new terms, pursuant to new sentences under new statutes. This is, however, less true for the recommitted parole violators, who are admitted to county jails on sentences pronounced under the pre-realignment regime. Perhaps plaintiffs' counsel will attempt to make something of that distinction.

More immediately relevant, however, is *Armstrong* itself, along with yet another class action, *Valdivia*,<sup>273</sup> which are both, like *Plata* and *Coleman*, being litigated by the Prison Law Office and Rosen, Bien, Galvan & Grunfeld. Under *Valdivia* and *Armstrong*, plaintiffs' counsel have for several years monitored decree compliance in parole-revocation hearings conducted in county jails. And a recent order in *Armstrong* gives plaintiffs' counsel substantial additional access to jail grounds and policies, as well as to prisoners' grievances, in order to monitor decree compliance, with attorney's fees funded by the state.<sup>274</sup> If the *Armstrong* order is not reversed by the Ninth Circuit during its pending appeal, that access gives plaintiffs' counsel insight into what is actually going on in the jails. The State and counties are fighting hard against that order. *Armstrong*'s lead counsel Michael Bien explains, "Although we have been monitoring CDCR activities in county jails in *Armstrong* and *Valdivia* for many years, realignment has put greater pressure and focus on the jails. So now the county officials are asking Jerry Brown, 'What the hell is going on? You're letting the plaintiffs' lawyers into our houses.'" <sup>275</sup> The point is not that the *Armstrong* or *Valdivia* litigations themselves will regulate jail conditions, but that the visibility they provide as a side benefit goes some distance towards solving the litigation challenge

---

<sup>271</sup> The *Plata* receiver's "Turnaround Plan of Action" includes oversight of medical care provided to CDCR prisoners housed in "out-of-state, community correctional, or re-entry facilities," to "ensure compliance with remedial orders of the federal courts . . ." J. CLARK KELSO, ACHIEVING A CONSTITUTIONAL LEVEL OF MEDICAL CARE IN CALIFORNIA PRISONS: THE FEDERAL RECEIVER'S TURNAROUND PLAN OF ACTION 19 (June 6, 2008), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0018-0076.pdf>.

<sup>272</sup> See Amended Order Granting Plaintiffs' Renewed Motion to Require Defendants to Track and Accommodate Needs of *Armstrong* Class Members Housed in County Jails, Ensure Access to a Grievance Procedure, and to Enforce 2001 Permanent Injunction at 18, *Armstrong v. Brown*, No. 94-cv-02307 (N.D. Cal. 2012), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0001-0021.pdf>; see also *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1063 (9th Cir. 2010) ("[D]efendants are responsible for providing reasonable accommodations to the disabled prisoners and parolees that they house in county jails.").

<sup>273</sup> No. 94-cv-00671 (E.D. Cal. filed May 2, 1994), available at <http://www.clearinghouse.net/detail.php?id=9465>.

<sup>274</sup> See Amended Order at 1, *Armstrong v. Brown*, No. 94-cv-02307 (N.D. Cal. Apr. 11, 2012), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0001-0021.pdf>; Interview with Michael Bien, *supra* note 13.

<sup>275</sup> Interview with Michael Bien, *supra* note 13.

jails pose by their diffusion and their hiddenness. All this could, however, change in the Ninth Circuit.

*Existing jail litigation:* The final possibility involves existing jail litigation — in particular, the 1990s jail decrees that include population caps. For a few of these — notably the ACLU's Los Angeles case — litigation has remained active.<sup>276</sup> But in most of the cases, the prisoners were represented by the Prisoners' Rights Union, which subsequently became, as one of its own members admits, "defunctish."<sup>277</sup> Over the last decade, the plaintiffs' lawyers who litigated these cases have let them languish unenforced, orphan decrees whose major function has been to empower sheriffs vis-à-vis their boards of supervisors and county courts. But it would be possible for the lawyers who negotiated those decrees to revive the cases. And in fact, this has recently happened in Plumas County, and, more complicatedly, in Orange County. The Orange County case marked the path: even though plaintiffs' counsel's efforts to preserve a 1980s-era decree failed, the end result after consolidation with an ADA jail case was a trial that plaintiffs won<sup>278</sup> — after which they were awarded \$3 million in attorneys' fees. After nearly twenty years of nonenforcement, Paul Comiskey and Dan Stormer, prisoners' counsel in the remaining dozen or so Prisoners' Rights Union cases, report that they have recently decided to try to revive all of them — conducting jail tours and filing appropriate enforcement motions.<sup>279</sup> Resource constraints mean that the work will be difficult, Stormer says, although it is possible that courts will authorize attorneys' fees for monitoring the extant orders. But for this kind of push to materialize, it will require building a coalition of lawyers around the state, and the work is just beginning.<sup>280</sup>

In short, in response to both realignment's increasing pressure on county jails and the improvements to conditions in state prisons driven by *Plata*, *Coleman*, and *Armstrong*, the California prisoners' rights bar is mobilizing to attack unlawful jail conditions on several fronts. If the hydra sprouts three or four or five new heads, these three approaches can probably manage that. Fifty-eight heads is a different story. In that event, Don Specter says, "I don't know what happens next, unless someone like me spends the next thirty years litigating in county jails."<sup>281</sup>

---

<sup>276</sup> *Rutherford v. Block*, No. 75-cv-04111 (C.D. Cal. filed Dec. 9 1975), available at <http://www.clearinghouse.net/detail.php?id=5500>.

<sup>277</sup> Interview with Richard Herman, *supra* note 13.

<sup>278</sup> See *Pierce v. Orange County*, No. 01-cv-00981 (C.D. Cal. filed Oct. 18, 2001), available at <http://www.clearinghouse.net/detail.php?id=9953>; *Stewart v. Gates*, No. 75-cv-03075 (C.D. Cal. filed Sep. 11, 1975), available at <http://www.clearinghouse.net/detail.php?id=10168>. The attorneys' fees figure is from Interview with Paul Comiskey, *supra* note 13; E-mail from Dan Stormer to author (July 23, 2012) (on file with author).

<sup>279</sup> Interview with Paul Comiskey, *supra* note 13; Interview with Dan Stormer, *supra* note 13.

<sup>280</sup> Interview with Dan Stormer, *supra* note 13.

<sup>281</sup> Interview with Don Specter, *supra* note 13.