

A DIFFERENT KIND OF SENTENCING COMMISSION: A “SMART” SOLUTION FOR CALIFORNIA AND A MODEL FOR PRISON DOWNSIZING ACROSS THE COUNTRY

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INTRODUCTION

Joan Petersilia and Francis Cullen begin their thoughtful and provocative article *Liberal but Not Stupid: Meeting the Promise of Downsizing Prisons* with a rather startling conclusion: “[T]he era of mass imprisonment in the United States likely has ended.”¹ Petersilia and Cullen argue that the wave of prison expansion across the country over the past thirty years has crested—citing reduced rates of incarceration nationwide, a number of recent prison reforms enacted in several large states, and evidence that “tough on crime” politics has lost its punch. Petersilia and Cullen peer over the wave and urge a conscientious (“not stupid”) pace to future prison downsizing, prioritizing empirically proven policies, scholarly observation, and commitment to public safety.

According to Petersilia and Cullen, we are at an historical moment where conditions are ripe to fundamentally rethink and reshape the country’s criminal justice system—so we better not blow it. Petersilia and Cullen worry that progressive criminologists and their reformist allies may ride the changing tide and overcorrect with policies and programs that do not address the true causes of crime and incarceration, pay short shrift to recidivism, could endanger public safety, and may reignite the reactionary throw-away-the-key politics that created the mess in the first place.

Petersilia and Cullen offer broad guiding principles for reform, rightly drawing lessons from the historical prison crowding problems and recent reforms in California. Amazingly, as they point out, the drop in incarceration

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1. Joan Petersilia & Francis T. Cullen, *Liberal but Not Stupid: Meeting the Promise of Downsizing Prisons*, 2 STAN. J. CRIM. L. & POL’Y 1, 4 (2015).

rates nationwide is largely attributable to the reduction of California's prison population since 2011.²

Despite progress in California, the state's prison problems are far from over—the State remains under a federal court order to implement a long-term “durable” solution to prevent future crowding,³ most of the state's county jail systems are also overburdened and under orders capping capacity,⁴ the Los Angeles County Jail (the nation's largest) is under a federal consent decree due to longstanding mistreatment of mentally ill inmates,⁵ and a recent report from the state's Department of Finance projects that the dip in California's incarceration rate may only be temporary.⁶

At its heart, Petersilia and Cullen's article poses a straightforward challenge: devise a plan that responsibly downsizes prisons without endangering public safety. This paper attempts to do exactly that. It includes a deliberately bold proposal to reevaluate who exactly should be in prison and for how long, with a roadmap for comprehensive reform that is sustainable over the long term.

In short, the best, most efficient, most responsible, most comprehensive, and most durable solution to California's ongoing criminal justice challenges requires the establishment of a sentencing commission. But not the kind that likely comes to mind.⁷ California needs a different type of commission—so dif-

2. *Id.* at 18.

3. *Coleman v. Brown*, 960 F. Supp. 2d 1057, 1069 (E.D. Cal. 2013).

4. Petersilia & Cullen, *supra* note 1, at 36; see also Paige St. John, *Gov. Jerry Brown's Prison Reforms Haven't Lived up to His Billing*, L.A. TIMES, June 21, 2014, <http://www.latimes.com/local/politics/la-me-ff-pol-brown-prisons-20140622-story.html#page=1>, archived at <http://perma.cc/A7Z7-DZWC> (describing crowded conditions in many county jails, including “scores of prisoners . . . stacked three high in steel bunk beds” in at least one county facility); SARAH LAWRENCE, STANFORD LAW SCHOOL, STANFORD LAW SCHOOL CRIMINAL JUSTICE CENTER, COURT-ORDERED POPULATION CAPS IN CALIFORNIA COUNTY JAILS, Dec. 2014, available at <http://www.law.stanford.edu/sites/default/files/child-page/183091/doc/slspublic/Jail%20popn%20caps%201.15.15.pdf>, archived at <http://perma.cc/7FFM-UYJJ>.

5. See Cindy Chang, *L.A. County Unable to Avert Federal Oversight of Jails*, L.A. TIMES, Oct. 2, 2014, <http://www.latimes.com/local/countygovernment/la-me-1003-sheriff-consent-decree-20141003-story.html>, archived at <http://perma.cc/86QL-YWBR>.

6. CAL. DEP'T OF FIN., SENATE BILL 105 FINAL REPORT 8 (2015) [hereinafter SB 105 REPORT], available at www.dof.ca.gov/budget/historical/2015-16/documents/2015_SB-105_Report_revised.pdf, archived at <http://perma.cc/5H66-RC6U> (“Thus, although there has been a decrease in admissions, the Department's population is increasing.”). Beyond California, the U.S. Department of Justice recently reported that there was a slight uptick in the prison population nationwide during 2013. See E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013 (2014), available at <http://www.bjs.gov/content/pub/pdf/p13.pdf>, archived at <http://perma.cc/7R6Y-5ARW>.

7. I don't intend to open a discussion of sentencing commissions in the abstract. For excellent analyses of the legitimacy, efficacy, and politics of sentencing commissions generally, see Rachel Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005); Robert Weisberg, *How Sentencing Commissions Turned Out to Be a Good Idea*, 12 BERKELEY J. CRIM. L. 179 (2007).

ferent that I hesitate to even use the words “sentencing commission.”⁸ A commission with the expertise and authority to design and implement needed reforms in California—a commission that is “smart” (or “not stupid” to borrow from Petersilia and Cullen)—would be substantively different from its cousins in other states in several important respects. As discussed below, a “smart” commission which followed the broad guiding principles laid out by Petersilia and Cullen would be (A) required to hit a specific statewide incarceration cap; (B) a temporary body whose authority sunsets after a discrete number of years; (C) vested with binding authority, absent a veto by the legislature and governor; and (D) enacted by voter initiative.

Recent experiences in California should provide some optimism that such a commission is politically realistic, that prisons can be downsized without endangering public safety, and that continued public pressure may provide an opportunity for systemic reform that can be a model for the country.⁹

My response to Petersilia and Cullen’s article is divided into three parts. In Part One, I address Petersilia and Cullen directly. I worry that their cautions undermine the urgency and magnitude of the problem of over-incarceration and may leave the impression that the prison population is manageable with traditional measures. Further, their recommendations for future policy reforms err on the side of generalities that may be unhelpful in practice. In Part Two, I describe many of the persistent problems in California’s prison system. Despite the reforms that Petersilia and Cullen rightly credit with substantially reducing the state’s prison population, California’s justice system remains in significant disrepair; intolerable and unconstitutional conditions persist; and long-term comprehensive reform is desperately needed. In Part Three, I attempt to answer what I take to be the central challenge of Petersilia and Cullen’s article by describing a plan for prison downsizing that I believe will *enhance* public safety.

8. Although prior efforts to establish a sentencing commission in California have failed, there is widespread support for the concept from unusual allies and almost every newspaper in the state. *See, e.g.*, Andy Furillo, *CA Prison Guards Announce Support for Sentencing Commission*, SACRAMENTO BEE, Feb. 15, 2007; Editorial, *Keeping California’s Worst Behind Bars*, L.A. TIMES, Apr. 11, 2014, <http://articles.latimes.com/2014/apr/10/opinion/la-ed-christopher-hubbart-serial-rapist-three-stri-20140410>, *archived at* <http://perma.cc/F7Z8-AYYQ> (“California needs a sentencing commission outside the political process to recommend sensible and balanced terms for offenses.”).

9. *See, e.g.*, Erik Eckholm, *Out of Prison, and Staying Out, After 3rd Strike in California*, N.Y. TIMES, Feb. 26, 2015, http://www.nytimes.com/2015/02/27/us/california-convicts-are-out-of-prison-after-third-strike-and-staying-out.html?_r=0, *archived at* <http://perma.cc/GBE9-GQ89> (reporting that recidivism rates of prisoners released under Three Strikes reforms are ten times better than average parolees); Sal Rodriguez, *Op-Ed., Sentencing Reform Overdue in California*, ORANGE COUNTY REGISTER, Mar. 5, 2015, <http://www.ocregister.com/articles/reform-653157-california-nonviolent.html>, *archived at* <http://perma.cc/88ML-68YX> (describing the history of the Three Strikes law and success of reforms in 2012); Editorial, *A Sentencing Commission for California*, N.Y. TIMES, Mar. 9, 2014, <http://www.nytimes.com/2014/03/10/opinion/a-sentencing-commission-for-california.html>, *archived at* <http://perma.cc/2HND-7WG7> (“The state should follow a proven path to clearing out its overcrowded prisons and permanently fix its penal system.”).

At risk of wading into waters that have sunk many ships before me,¹⁰ I begin with the guiding principles for reform offered by Petersilia and Cullen to outline a new kind of sentencing commission for California, which I believe is the most responsible and politically feasible solution to the state's current situation. If successful, the kind of commission described below could be a model for similar downsizing reforms throughout the country.

I.

Petersilia and Cullen's opening salvo, that the legal, political, cultural, and economic drivers of mass imprisonment in America are reversing course, may leave the impression that the problem is coming under control. It also stands in stark contrast to gathering consensus among scholars, policymakers, and commentators who describe an immediate legal, political, and moral crisis in criminal justice policy nationwide.

Just last month, U.S. Supreme Court Justice Anthony Kennedy testified before Congress that the nation's criminal justice system was "broken."¹¹ At a speech at NYU Law School in September, U.S. Attorney General Eric Holder described over-incarceration as one of the nation's most "urgent" challenges.¹² His concerns were not about prison crowding, prison conditions, or prison costs, but the fundamental harm that incarceration inflicts on individuals, their families, and communities. "High incarceration rates and longer than necessary prison sentences have not played a significant role in materially improving public safety, reducing crime, or strengthening communities," Holder announced. "In fact, the opposite is often true."¹³ The Attorney General's speech came on the heels of a report released last summer by the National Academy of Sciences, which stepped beyond its traditional terrain to examine incarceration in a 350-page study, concluding at the outset that the country's incarceration rate is "historically unprecedented and internationally unique."¹⁴ And in California,

10. The history of prior attempts to establish a sentencing commission in California is not a pretty one. *See generally* Weisberg, *supra* note 7 (summarizing much of the political and legal history of sentencing commissions); STANFORD LAW SCHOOL CRIMINAL JUSTICE CENTER, *THE CALIFORNIA SENTENCING COMMISSION: LAYING THE GROUNDWORK*, Mar. 9, 2007, available at https://www.law.stanford.edu/sites/default/files/child-page/266901/doc/slspublic/Stanford_Exec_Sessions_Report_Recommendations.pdf, archived at <http://perma.cc/YM2Q-PR29> (discussing history of attempts to establish sentencing reform commissions in California and elsewhere); AP Alert, *Assembly Rejects Sentencing Commission*, Sept. 8, 2007 (briefly describing the demise of legislation to establish a commission in California).

11. C-Span, *Kennedy and Breyer 2*, C-Span (Mar. 23, 2015), <http://www.c-span.org/video/?c4532206/kennedy-breyer-2>.

12. Brennan Center for Justice, *AG Eric Holder's Keynote for Shifting Law Enforcement Goals to Reduce Mass Incarceration*, YOUTUBE (Sept. 23, 2014), https://www.youtube.com/watch?v=2xSVJ_VfX-M.

13. *Id.*

14. NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING THE CAUSES AND CONSEQUENCES* (2014).

which Petersilia and Cullen mark as ground zero for the end of mass incarceration, prisons and jails remain under orders from numerous courts, including the United States Supreme Court, to alleviate overcrowding.¹⁵

These public calls for reform from the highest levels of government may prove Petersilia and Cullen's point that the cultural and political climate around crime appears to have turned a significant corner. In 1994, Bill Clinton used his State of the Union Address to call for longer prison sentences and the enactment of "three strikes" statutes.¹⁶ Some twenty years later, Barack Obama used his most recent State of the Union Address to praise the reduction in the country's incarceration and crime rates—to applause from both sides of the aisle.¹⁷ Petersilia and Cullen also correctly point out that some of the country's staunchest conservatives are among the most vocal advocates for prison downsizing.¹⁸ Even archconservative industrialist Charles Koch has called for sentencing reform: "We have paid a heavy price for mass incarceration and could benefit by reversing this trend," he wrote.¹⁹

At the same time, Petersilia and Cullen may leave the impression that the prison population has plateaued and may be under control. They urge caution with future reform and worry that a lack of empirically driven policies may ultimately endanger public safety. Their call for empirical analysis and focus on public safety, especially to curb recidivism, is unobjectable but unspecific. Like

15. See Chang, *supra* note 5, (reporting on a federal consent decree regarding jail crowding and longstanding mistreatment of mentally ill inmates). See generally SB 105 REPORT, *supra* note 6.

16. See Gwen Ifill, *White House Offers Version of Three Strikes Crime Bill*, N.Y. TIMES, Mar. 2, 1994, <http://www.nytimes.com/1994/03/02/us/white-house-offers-version-of-three-strikes-crime-bill.html>, archived at <http://perma.cc/Y8QT-5JLQ>. For a more thorough review of the history of Three Strikes laws, particularly in California, see Michael Romano, *Striking Back: Using Death Penalty Law to Fight Disproportionate Sentences Imposed Under California's 'Three Strikes' Statute*, 21 STAN. L. & POL'Y REV. 311 (2010).

17. See Ryan Reilly, *Obama Calls for Criminal Justice Reform in State of the Union*, HUFFINGTON POST (Jan. 20, 2015), http://www.huffingtonpost.com/2015/01/20/obama-criminal-justice-reform_n_6471630.html, archived at <http://perma.cc/HM2F-MATS>.

18. See, e.g., *Statement of Principles*, RIGHT ON CRIME, <http://www.rightoncrime.com/the-conservative-case-for-reform/statement-of-principles>, archived at <http://perma.cc/FP3V-FP67> (signed by Grover Norquist, Jeb Bush, Newt Gingrich, William Bennett, and Edwin Meese, among others, and noting that "Conservatives are known for being tough on crime, but we must also be tough on criminal justice spending.") (last visited Mar. 24, 2015).

19. Charles Koch & Mark Holden, *The Overcriminalization of America: How to reduce poverty and improve race relations by rethinking our justice system*, POLITICO (Jan. 7, 2015), <http://www.politico.com/magazine/story/2015/01/overcriminalization-of-america-113991.html#VR1aLFzT2TA>, archived at <http://perma.cc/BFJ6-WJBF>. Petersilia and Cullen also cite national public opinion research revealing widespread and bipartisan support for alternatives to incarceration for nonviolent offenders and juveniles. Petersilia and Cullen, *supra* note 1, at 9, 26; see also PEW CHARITABLE TRUSTS, PUBLIC OPINION ON JUVENILE JUSTICE IN AMERICA (Nov. 2014) available at http://www-aws.pewtrusts.org/~media/Assets/2014/12/PSPP_juvenile_poll_web.pdf?la=en, archived at <http://perma.cc/47SR-PWCR> (discussing voter preferences that low-level juvenile offenders be dealt with through means other than incarceration).

much of the scholarship in the area, Petersilia and Cullen have a national audience and any recommendations must be sufficiently general to cover state and federal jurisdictions. However this level of abstraction tends to translate to little practical impact.

Ironically, as I discuss below, the most cautious, empirically driven, and responsible reform, of the type urged by Petersilia and Cullen, calls for a specific and most radical solution: the establishment of a panel of experts—a commission—empowered to reevaluate California’s justice system as a whole (sentencing laws, prison space, jail availability, and parole rules) so we may understand the interrelated gears of the justice ecosystem and maximize public safety benefit using limited prison, jail, and law enforcement resources.

I also believe there is more cause for optimism (and urgency) for reform than Petersilia and Cullen suggest. First, early results indicate that prison downsizing is working. As the President noted during his State of the Union Address, national crime rates continue to decline at the same time as several states and the federal government reduce the number of people behind bars.²⁰ To the extent that the wave of mass incarceration has crested, resulting in shorter prison sentences and fewer people behind bars, especially in California, the evidence to date shows no negative impact on public safety—in fact crime rates in California remain on a long-term declining curve.²¹

Second, there is a constitutional and political imperative for reform, especially in California. Conditions in California’s prisons are so deplorable, and so grievous, especially in the treatment of mentally ill prisoners, that even the U.S. Supreme Court found that they are “incompatible with the concept of human dignity and [have] no place in civilized society.”²² In California, these violations have been ongoing for more than two decades and remain fundamentally unresolved.²³ Beyond California, prisons and jails across the country remain crowded with mentally ill people. According to the U.S. Department of Justice,

20. See Reilly, *supra* note 17.

21. See PUBLIC POLICY INSTITUTE OF CALIFORNIA, CRIME TRENDS IN CALIFORNIA (Nov. 2014), available at http://www.ppic.org/content/pubs/jtf/JTF_CrimeTrendsJTF.pdf, archived at <http://perma.cc/967R-9MCL>. Perhaps the most closely watched cohort of prisoners released early are the roughly 2,000 inmates freed from life sentences under the Proposition 36 reforms to California’s Three Strikes law. To date, the recidivism rate of those released under Proposition 36 is 4.7 percent, or roughly ten-times better than the average inmate released from prison. See Eckholm, *supra* note 9; Hamed Aleaziz, *Inmates Released Under Prop. 36 Doing Well, Advocates Say*, S.F. CHRONICLE, Nov. 9, 2014, <http://www.sfgate.com/bayarea/article/Former-inmates-released-under-Prop-36-doing-5882198.php>, archived at <http://perma.cc/4X9L-HK3R>; STANFORD LAW SCHOOL THREE STRIKES PROJECT, PROPOSITION 36 PROGRESS REPORT: OVER 1,500 PRISONERS RELEASED, HISTORICALLY LOW RECIDIVISM RATE, (Apr. 2014), <https://www.law.stanford.edu/sites/default/files/child-page/595365/doc/slspublic/ThreeStrikesReport.pdf>, archived at <http://perma.cc/7X6J-2XG3>.

22. *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

23. See *id.* at 1922; St. John, *supra* note 4 (describing crowded conditions in many county jails, including “scores of prisoners stacked three high in steel bunk beds” in at least one county facility).

56 percent of all state prisoners and 64 percent of the nation's jail inmates are mentally ill.²⁴ Voters have also demanded reform. In 2012, California voters overwhelmingly approved the Three Strikes Reform Act (Proposition 36), scaling back the country's harshest recidivist sentencing law.²⁵ California voters took reforms a step further this past November, enacting the Safe Neighborhoods and Schools Act (Proposition 47), also by a wide margin.²⁶ These ballot measure reforms come on top of California's Realignment legislation, discussed at some length by Petersilia and Cullen, which resulted in an immediate and dramatic reduction in California's prison population by shifting certain offenders from custody in state prison to custody in county jails.²⁷

Third, there is an abiding moral imperative for reform. As Attorney General Holder acknowledged, many prison sentences are longer than necessary to accomplish legitimate goals of incarceration.²⁸ Excessive sentences are irrational, expensive, and come at a devastating human toll that is impossible to measure. The problem of excessive sentences is of course exacerbated by its place in our nation's struggle with race and the undeniable fact that a grossly disproportionate share of this unnecessary harm falls on poor, disenfranchised people of color.

At the same time, we should take Petersilia and Cullen's warnings to heart. I am on guard against the naïve, judgment-clouding liberalism that Petersilia and Cullen decry.²⁹ As counsel for many prisoners in current litigation, I cannot deny that sympathies may bias my judgment in close cases. But the pendu-

24. DORIS JAMES & LAUREN GLAZE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES I (DEC. 14, 2006), available at www.bjs.gov/content/pub/pdf/mhppji.pdf, archived at <http://perma.cc/UVB8-SRZQ>. Some scholars have suggested that the Supreme Court's renewed emphasis on protecting the fundamental dignity of mentally ill offenders under the Eighth Amendment, established by *Plata*, may pave the way for a constitutional solution to mass incarceration. See, e.g., JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA 133-54 (2013).

25. See generally David Mills & Michael Romano, *The Passage and Implementation of the Three Strikes Reform Act of 2012 (Proposition 36)*, 25 FED. SENT'G REP. 265 (2013).

26. Proposition 47 reduces the punishments for several nonviolent crimes, including simple drug possession and shoplifting, from felonies to misdemeanors. Paige St. John & Marisa Gerber, *Prop. 47 Jolts Landscape of California Justice System*, L.A. TIMES, Nov. 6, 2014, <http://www.latimes.com/local/politics/la-me-ff-pol-proposition47-20141106-story.html#page=1>, archived at <http://perma.cc/VTN6-ANFN>.

27. Petersilia & Cullen, *supra* note 1, at 27-30; see generally Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, 8 HARV. L. & POL'Y REV. 327 (2014) [hereinafter Petersilia, *California Prison Downsizing*]. Despite the political clamor for reform in California, some elected officials are sidestepping this reform too by using prosecutorial discretion to file alternative criminal charges in many cases, resulting in longer prison terms and an uptick in the state's overall prison population. See SB 105 REPORT, *supra* note 6, at 8-9.

28. See Brennan Center for Justice, *supra* note 12.

29. Petersilia and Cullen argue that many of their colleagues and reformers suffer from "an over-identification with offenders and denial of pathology," which clouds their judgment at the expense of endangering public safety. Petersilia & Cullen, *supra* note 1, at 38.

lum of criminal justice policy has swung so widely off track, and the harm caused by unnecessary punishment is so calamitous, that I do not believe that the need for systemic correction is a close call.

II.

As recently as 2011, my colleague Robert Weisberg wrote that “California has by many measures the most dysfunctional incarceration system in the nation.”³⁰ Since then, the State has enacted several measures, including the 2011 Public Safety Realignment Act, which Petersilia and Cullen discuss at length. Since the enactment of Realignment, the state prison population has dropped from a high of 173,000 inmates in 2007 to just over 135,000 inmates in 2014.³¹

California’s prison population reduction began in earnest with the landmark litigation in *Brown v. Plata*,³² in which the Supreme Court ultimately held that the state’s prison system was unconstitutionally overcrowded and affirmed a lower court order for massive downsizing. The California legislature responded by enacting the 2011 Public Safety Realignment Act, which resulted in a dramatic redistribution of public safety resources—from state prisons to county jails and probation—and an overall reduction of California’s state prison population.³³

In fact, California’s prison population reduction is so great that it accounts for most of the reduction of prisoners nationwide.³⁴ This fact alone should demonstrate that despite changing political and cultural attitudes toward crime and punishment, the national problem of mass incarceration remains mostly un-

30. Robert Weisberg, *California’s De Facto Sentencing Commissions*, 64 STAN. L. REV. ONLINE 1 (2011), <http://www.stanfordlawreview.org/sites/default/files/online/articles/64-SLRO-1.pdf>.

31. See CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, FALL 2014 POPULATION PROJECTIONS 9, available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Projections/F14Pub.pdf, archived at <http://perma.cc/JYK8-XVGE>.

32. 131 S. Ct. 1910 (2011). For an excellent analysis and history of the *Plata* litigation see SIMON, *supra* note 24.

33. Petersilia & Cullen, *supra* note 1, at 27. In fact, weeks prior to publication of their article, the California Department of Corrections and Rehabilitation announced that the state’s prison population has dipped just below a prison population cap ordered by the federal courts under *Plata*. See Paige St. John, *California prisons dip below court-ordered population cap*, L.A. TIMES, Jan. 29, 2015, <http://www.latimes.com/local/political/la-me-ff-california-prisons-dip-below-federal-population-cap-20150129-story.html>, archived at <http://perma.cc/ZZ2Q-7TJC> (reporting that the state prison system was ordered to reduce its population to 137.5 percent of design capacity and that the population is currently at 137.2 percent of current capacity); see generally, Petersilia, *California Prison Downsizing*, *supra* note 27.

34. Petersilia & Cullen, *supra* note 1, at 18-20.

resolved. Recent reports show that prison populations in California and nationwide are back on the rise.³⁵

Moreover, despite improvements in California, the reforms here are not sustainable in the long run, and they obscure the truth about incarceration in the state. Reforms ordered by the U.S. Supreme Court, the three-judge panel administering the state's prison population reduction, and the 2011 Realignment Act have swept many of California's problems under the rug.

For instance, much of the decline in California's prison population since Realignment has been absorbed by an increase in the state's county jail and probation populations.³⁶ In many respects, Realignment merely pushed the problem of over-incarceration from the state-run prison system to local jails run by California's fifty-eight counties. Petersilia and Cullen describe this "trans-incarceration" and acknowledge that the state's jail systems are also overcrowded.³⁷ As a result of this cascading problem, shifting inmates from one overburdened system to another, many inmates are being released early, at the sole discretion of county sheriffs in charge of their respective jail systems.³⁸ Some inmates in Los Angeles County Jail (the nation's largest) are released after serving only ten percent of their sentences.³⁹ As a consequence of these early releases on the county jail level, evidence suggests that county prosecutors are subverting Realignment by using their discretion to charge sentence enhancements not covered by the statute, resulting in state prison terms that are

35. See CARSON, *supra* note 6; FALL 2014 POPULATION PROJECTIONS, *supra* note 31, at 9 (showing a 1.9 percent increase in California's prison population from 2013 to 2014).

36. See LISA T. QUAN, ET AL., STANFORD LAW SCHOOL, STANFORD CRIMINAL JUSTICE CENTER, REALLOCATION OF RESPONSIBILITY: CHANGES TO THE CORRECTIONAL SYSTEM IN CALIFORNIA POST-REALIGNMENT (Jan. 2014), available at <http://www.law.stanford.edu/sites/default/files/child-page/183091/doc/slspublic/CC%20Bulletin%20Jan%2014.pdf>, archived at <http://perma.cc/33DV-VP6A>.

37. Over thirty-five county jails in California are under court-ordered or self-imposed population caps. Petersilia & Cullen, *supra* note 1, at 36; see also MATTHEW CATE & ROBERT WEISBERG, STANFORD LAW SCHOOL, STANFORD CRIMINAL JUSTICE CENTER, BEYOND LITIGATION: A PROMISING ALTERNATIVE TO RESOLVING DISPUTES OVER CONDITIONS OF CONFINEMENT IN AMERICAN PRISONS AND JAILS (Dec. 2014), available at <http://www.law.stanford.edu/sites/default/files/child-page/183091/doc/slspublic/Beyond%20Litigation,%20Cate%20and%20Weisberg%20Final.pdf>, archived at <http://perma.cc/7S8A-XBN2> ("The prison [crowding] litigation has produced a final irony—but also a great opportunity to draw and apply lessons: The very same lawyers who successfully brought these suits against the state have now shifted their focus to California's county jails."); LAWRENCE, *supra* note 4 (noting that many of the jail caps, including those in Los Angeles, San Diego, and Sacramento, have been in place since the 1970s).

38. See Weisberg, *supra* note 30, at 5-6.

39. See St. John, *supra* note 4 (describing crowded conditions in many county jails, including "scores of prisoners stacked three high in steel bunk beds" in at least one county facility).

longer than would have been imposed before Realignment. The tactic is slowly but steadily reversing downsizing trends in the state prison system.⁴⁰

Other reforms have been ordered by the three-judge panel administering the *Plata* litigation, but these too have obscured the problem. The reforms ordered by the federal court have largely played with the math used to calculate a prisoner's "good time credits" and how much time he or she actually spends behind bars. Under these court-ordered reforms, thousands of inmates with serious and violent convictions are now eligible for release after serving less than half of their prison sentences.⁴¹

Thus in many cases, the recent reforms put in place by the courts, the legislature, and the voters in California are as complicated, opaque, and nonsensical as the existing sentencing laws, enhancements, and parole eligibility timetables that created the mess in the first place. And recent projections by the state indicate that the band-aids may be peeling off, as the prison population trend may be reversing course and the incarceration rate is back on the rise.⁴²

California needs a revision of its sentencing rules that addresses the system as a whole. Piecemeal legislation that identifies particular problems or gaps in the Penal Code have created a siloed perspective on criminal justice and public safety in California. Any state's prison and jail system is a limited resource and should, I believe, be carefully allocated to maximize public safety. The flurry of reforms implemented in California has undermined confidence that the state has the right (*i.e.* the most dangerous) people behind bars.⁴³

California's hand may be being forced, but if it can design, build, and implement systemic long-term reform of its broken prison system, it may provide a model and roadmap to tackling the problems of over-incarceration nationwide.

40. More specifically, immediately following Realignment there was a significant (greater than twenty percent) aggregate increase statewide in the number of offenders sentenced with enhancements enacted as part of California's Three Strikes law. The enhancements effectively double an offender's sentence, and are not impacted by Realignment, so these offenders have been sent to state prison. As a result, the California Department of Finance concluded that although fewer inmates are being sent to state prison, the inmates who are being sent to state prison are serving longer sentences, on average, thus driving up the long-term population. See SB 105 REPORT, *supra* note 6, at 8.

41. See Order Directing Compliance Officer to Confer With Parties, *Coleman, et al. v. Brown*, No. 2:90-cv-0520 KJM DAD; *Plata, et al. v. Brown*, No. C01-1351 TEH (Oct. 29, 2014).

42. See SB 105 REPORT, *supra* note 6, at 3-4.

43. See, e.g., George Skelton, *Movement builds to fix major flaw in Prop. 47*, L.A. TIMES, Feb. 25, 2015, <http://www.latimes.com/local/politics/la-me-cap-proposition47-20150226-column.html>, archived at <http://perma.cc/74AM-ZYGP> (discussing unintended consequences of California's recent Proposition 47 for DNA collection from arrestees).

III.

Despite the cautiousness urged by Petersilia and Cullen, it would be a mistake to say they believe the problem of over-incarceration is behind us. Petersilia and Cullen's challenge to devise a plan that downsizes prisons without endangering public safety is the same test that the three-judge federal court administering California's crowding cases posed when it ordered the state to implement a long-term "durable" solution to the state's prison crowding crisis.⁴⁴ There is consensus among those who follow the issue in California that reforms to date have been imperfect half-measures. The remainder of this Comment is an attempt to answer that challenge with a realistic, politically viable, and sustainable solution.

Petersilia and Cullen offer five broad guiding principles to future reform: (1) set inmate population caps; (2) account for recidivism; (3) invest in prisoner rehabilitation; (4) ensure that state and local governments receive technical assistance, including access to data across states; and (5) apply rigorous study to the reforms once put in place as part of a new "criminology of downsizing."⁴⁵ Because Petersilia and Cullen focus much of their attention on California, because it is where my own expertise lies, because a useful plan for prison downsizing should be more specific than generic, because the federal court has ordered the development of such a plan (and none appear on the horizon), and because California can be a model for the nation in responsible prison downsizing, the solution I propose focuses here.⁴⁶

44. See Order Denying Defendants' Motion to Stay June 20, 2013 Order, *Coleman, et al. v. Brown*, No. 2:90-cv-0520 LKK JFM; *Plata, et al. v. Brown*, No. C01-1351 TEH (July 3, 2013) [hereinafter Order Denying Motion to Stay].

45. Petersilia & Cullen, *supra* note 1, at 38-41.

46. Prison overcrowding and the political obstacles to reform are not unique to California. A common response to these problems has been the enactment of different varieties of "sentencing commissions" to analyze state sentencing laws and practices and to recommend reforms and guidelines to judges, policy leaders, and lawmakers in a depoliticized context. The structure, makeup, and powers provided to sentencing commissions vary from state to state. But by and large, state sentencing commissions share much in common with the Federal Sentencing Commission, which is a permanent standing body of experts (judges, prosecutors, administrators, and academics) who monitor sentencing trends, set guidelines, and offer nonbinding recommendations to Congress when reform is deemed warranted. Sentencing commissions have received considerable academic analysis, and criticism, which I don't intend to belabor here. However, as both Weisberg and Barkow note, at least one exception to any (perceived) ineffectiveness of the commission model worth noting is North Carolina's Sentencing and Policy Advisory Committee, enacted by the state legislature 1990. See generally, Barkow, *supra* note 7, at 782-87. At the time, North Carolina's prison system was dramatically overcrowded and was forced to release inmates at a fraction of the sentencing imposed. The state also had one of the highest incarceration rates in the country. The North Carolina Committee was charged with building a model to predict the impact of different sentencing laws on prison populations and with recommending changes to safely reduce prison overcrowding, with a focus on reducing incarceration of nonviolent offenders. The Committee's work led to the enactment of the Structured Sentencing Act, which became effective in 1994. In the years since, reports show that North Carolina downsized its prison

California should enact a new kind of sentencing commission with the expertise and authority to design and implement needed reforms based on data and empirical risk analysis to make sure dangerous offenders remain behind bars, maximize the use of limited prison and jail resources, and eliminate excessive, ineffective, expensive, and unfair sentences currently on the books. The commission envisioned here would fulfill the foundational principles described by Petersilia and Cullen by: (A) being required to hit a specific statewide incarceration cap; (B) being a temporary body whose authority sunsets after a discrete number of years; (C) being authorized to issue binding recommendations, absent a veto by the legislature and governor; and (D) being enacted by voter initiative.

A. *Population Cap*

The first—and most important—element of an effective commission in California is that the commission be directed to recommend changes to the state’s sentencing laws that will result in a specific cap to the overall number of people incarcerated in the state’s prisons and jails. Petersilia and Cullen also identify the establishment of a population cap as their first priority in smart (*i.e.* “not stupid”) sentencing reform. A mandated cap may be a blunt instrument, but it is not a novel idea for governing sentencing commissions,⁴⁷ and in the end, as Petersilia and Cullen justifiably observe, “the only real way to downsize prisons is to set a hard limit in capacity.”⁴⁸ This is the most concrete, radical, and commendable recommendation that Petersilia and Cullen make.

A hard cap is essential because it avoids what is probably the largest problem with ordinary sentencing commissions. If a commission is tasked with hitting a specific incarceration population cap then the political leanings of committee members become significantly less important. If constrained by a hard cap, I am convinced that a commission of the most progressive and most conservative members will largely agree where California’s sentencing rules should be changed. There should be little debate that the state’s limited resource of prison and jail beds be reserved for the most dangerous offenders. There will undoubtedly be disagreements over some details, but I predict few if

population to meet capacity while, over the same period of time, crime rates remained at or below the national average. *See* Weisberg, *supra* note 7, at 212-13.

47. Several states have enacted commissions that are charged with, among other goals, avoiding prison overcrowding and projecting the future prison population. *See, e.g.* ALA. CODE § 12-25-2(a)(4) (1975); MINN. STAT. § 244.09(5) (2005); OR. REV. STAT. § 137.656(2) (2014); WASH. REV. CODE § 9.94A.010(6) (2011). At least one state commission, the Minnesota Sentencing Guidelines Commission, has interpreted that mandate to recommend sentencing reforms that would target a certain level of incarceration capacity (ninety-five percent of state prison and jail beds). The cap is credited as a successful tool for depoliticizing certain aspects of sentencing reform in Minnesota. *See* Barkow, *supra* note 7, at 775-77. However, as discussed below, the commission proposed here for California significantly differs from the Minnesota commission because its recommendations would be binding.

48. Petersilia & Cullen, *supra* note 1, at 38.

the commission is charged with addressing the state's justice system as a whole.⁴⁹ Viewing the system as a whole is necessary to prioritize limited criminal justice resources. In recent testimony before Congress, U.S. Supreme Court Justice Stephen Breyer suggested that legislators generally fail to view the penal system holistically: "Who will do the prioritizing? You think you can do it here? You proceed crime by crime," he said.⁵⁰ A commission charged with implementing a statewide population cap will largely undercut politics, horse-trading, and battles over commission membership, with one exception: the chairperson of the commission must be someone with credibility among the public and policymakers, patience and smarts to evaluate empirical data, and leadership qualities to force other members to hit the mandated cap: someone like the Chief Justice of the California Supreme Court.

What should the cap be? This may be the hardest question in developing an effective commission in California. At the outside, we know from the U.S. Supreme Court that the constitutional threshold of the state's prison population is 137.5 percent of design capacity,⁵¹ so any cap must be something below that number. If the commission is to comprehensively address California's public safety resources, a cap should account for the state's entire incarceration capacity, meaning both prison and jail space. The commission cannot skirt the state-level problem of prison crowding by shifting more inmates to county jails, which, as mentioned above, are already overcrowded and capped by law.⁵² An effective cap should be driven by the data and account for crime rates, population trends, and effective alternatives to incarceration. A reasonable first task for the commission would be to set the cap for themselves, relying on data to establish the maximum operational capacity of state prisons and jails.

In 2010, the California Department of Corrections and Rehabilitation commissioned a confidential study to determine a "manageable operational capacity" for the state's prison system. According to the study, which later appeared as evidence submitted by the plaintiffs in the *Plata* prison crowding litigation, the report "was intended to be methodical, evidence based, supported by the [American Correctional Association (ACA)] national standards, and consistent with (although not necessarily identical to) approaches used by other large state prison systems and the Federal Bureau of Prisons." The study examined capacity conditions at each of California's thirty-three prison facilities, occupied consultants for a year, and resulted in a detailed 57-page report. In the end, the report concludes that if ACA standards are applied, the maximum

49. See Barkow, *supra* note 7, at 776 ("Perhaps most importantly, the [Minnesota] Commission's use of capacity as a constraint on its sentencing policies 'shielded the commission from political pressure to toughen sentences.'") (citation omitted).

50. See *Kennedy and Breyer 2*, *supra* note 11.

51. *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

52. See generally LAWRENCE, *supra* note 4.

manageable operational capacity of California's current prison system is approximately 99,000 inmates, or 118 percent of current design capacity.⁵³

It is difficult to argue that California's prison population should exceed the maximum capacity recommended by the state's own experts applying standards promulgated by the ACA.⁵⁴ In addition, any cap or population target imposed on a commission in California should also account for prisoners housed out-of-state (currently almost 9,000 inmates), inmates held in privately run prisons, and the possibility that additional prison and jail beds may be built in the future.⁵⁵ Provisions governing the commission could permit, limit, or outright ban exporting prisoners for housing in other states or in private prisons and could include regulations on new prison or jail construction.

Whatever the exact cap may be, the commission would then be tasked with projecting incarceration trends and adjusting all sentencing laws to maximize public safety without exceeding the proscribed incarceration cap.⁵⁶ As Petersilia and Cullen recommend, the commission should take an empirical, evidence-based approach, account for recidivism, and direct investments in prisoner rehabilitation.⁵⁷

53. Pulitzer/Bogard & Associates, LLC, California Department of Corrections and Rehabilitation Prison Capacity Planning Final Report, *Plata, et al. v. Brown*, No. 3:01-cv-01351-TEH (March 11, 2013).

54. Perhaps recognizing the scale of downsizing that would be required by adopting the ACA guidelines (at the time, California was operating at almost 200 percent of design capacity), the Report concluded that if certain mitigation policies are developed, including allowing prisoners more time outside of their cells, California's prison system could absorb approximately 108,000 prisoners, or 128 percent of design capacity.

55. See Petersilia & Cullen, *supra* note 1, at 21 (noting that the California legislature made available \$1.2 billion for new jail construction, which could provide for the addition of up to about 11,000 more jail beds over the next five years); see also Eric Kurhi, *New \$70 million jail tower in San Jose recommended by Santa Clara County officials*, SAN JOSE MERCURY NEWS, Jan. 22, 2015, http://www.mercurynews.com/crime-courts/ci_27370614/santa-clara-county-mulls-plan-new-70-million, archived at <http://perma.cc/S3XA-6KVE> (describing Santa Clara County's plan to construct a new ten-story jail tower to address changed needs in the wake of California's Realignment); Abbey Sewell, *L.A. Supervisors Vote to Move Forward on \$2-Billion Jail Plan*, L.A. TIMES, May 6, 2014, <http://www.latimes.com/local/lanow/la-me-ln-jail-plan-vote-20140506-story.html>, archived at <http://perma.cc/9REN-4MBR> (discussing Los Angeles County's proposed plans to renovate its downtown men's jail, to build a new women's jail, and to divert mentally ill offenders from the jail system altogether).

56. See Weisberg, *supra* note 7, at 198.

57. As in North Carolina, the commission should focus on ensuring incarceration for offenders who remain dangerous while developing alternatives and incentives for nonviolent offenders. The task is a difficult one, but the experience of commissions in other states, particularly in North Carolina and Minnesota, show that it's possible. See Barkow, *supra* note 7, at 777, 785-86 (describing sophisticated computer modeling and expert forecasting by the Minnesota and North Carolina sentencing commissions that was able to accurately predict future prison population, in North Carolina's case to within one percent of actual prison population numbers).

B. *Deadline*

The second critical element of an effective commission in California is that it should be required to present its recommended changes by a certain deadline. The task of projecting incarceration trends, assessing risks and needs, modeling state- and county-level incarceration rates and population growth trends, and issuing sentence modifications to hit an incarceration cap is unprecedented in California and would take a fulltime staff several years to complete. But nothing focuses the mind like a deadline, and I believe three years should be sufficient. By the end of this deadline, the commission should be required to present a single comprehensive package modifying the state's sentencing laws to meet the prescribed population cap. Upon publication of its comprehensive sentencing plan, the commission should dissolve.⁵⁸

Absent an enforceable deadline a commission would almost certainly fail to produce meaningful reform. A deadline is as important as a cap because it will eliminate the tactic of delay by any commission member or powerful constituency unhappy with the direction of the group and, in conjunction with an immovable cap, will ultimately force consensus. A deadline and sunset provision will also avoid the bureaucratic instinct toward self-preservation.

It is worth noting that California does not have a good track record with deadlines in this area. The State repeatedly failed to meet prison population benchmarks set by federal courts in the prison crowding cases, and the courts and plaintiffs' lawyers have been frustrated by the lack of an adequate remedy for the State's failure to comply.⁵⁹ In order to enforce the deadline and the cap, the commission should be chaired by a strong leader, such as the state's Chief Justice. Another enforcement mechanism could be a poison pill provision that would automatically cut the state's prison budget funding to county jails if the commission failed to meet its deadline.

58. Although a deadline is critical, it may be wise to permit reconstitution of a commission periodically to address crime and population trends that change overtime. My instincts oppose a permanent standing commission, but a commission that could reconstitute every ten years or so could make sense.

59. In 2013, the three-judge federal panel overseeing California's prison crowding litigation (the consolidated cases *Coleman* and *Plata*) summarized the State's delay and failure to comply with court-ordered prison population caps:

Coleman was initiated 23 years ago, and *Plata* 12 years ago. The district court in *Coleman* has issued over 100 substantive orders in an attempt to bring [the State] into compliance with the Eighth Amendment of the Constitution. The district court in *Plata* has issued over 50 such orders, and undoubtedly would have issued many more. . . . After this long history of [the State's] noncompliance, this Court cannot in in conscience grant a stay that would allow [the State] to both not satisfy the Population Reduction Order and relitigate the Supreme Court's emphatic decision in the very case before us.

Order Denying Motion to Stay, *supra* note 44; see also Don Thompson, *State Prison Chief: 'We Need More Time' to Reduce Inmate Population*, KQED NEWS, Jan. 8, 2014, <http://ww2.kqed.org/news/2014/01/08/123014/prison-overcrowding-controversy>, archived at <http://perma.cc/T5HM-MGK4>.

C. *Binding Authority*

Next, an effective commission must be empowered with genuine authority to revise sentencing laws. A commission empowered only to issue reports or make recommendations to the legislature would be a worthless endeavor in California. The revisions published by the commission should become law unless vetoed by the legislature and governor. The strongest authority that a commission should have is the power to issue reforms that become law unless both a two-thirds majority of the state legislature and the governor oppose them.

A commission armed only with the ability to issue advisory reports, guidelines, and recommendations to the legislature would be especially fruitless in California. To begin with, the track record of sentencing commissions with only advisory authority in other states is not a stellar one. Moreover California lawmakers in particular have shown little resolve to substantially address prison overcrowding. Despite the U.S. Supreme Court's ruling that the state's prisons are unconstitutionally overcrowded, that conditions within prisons violate prisoners' basic right to fundamental human dignity guaranteed by the Eighth Amendment, and its direct order to enact reforms addressing these problems or face court-ordered releases of tens of thousands of state prisoners, the California legislature has failed to address the issue in any comprehensive, effective, or holistic way.⁶⁰

But even assuming that California's legislature had the political will to create a commission and listen to its advice, the commission would fail for a more technical reason—many of the laws that created the prison crowding situation in California were enacted by voter initiative and, by law, can only be amended by another ballot measure (or two-thirds vote of the legislature).⁶¹

For example, thirty-two percent of current prisoners in California were sentenced under different provisions of the Three Strikes Law of 1994 (Proposition 184). Most of these prisoners are serving enhancements that double the length of their sentences and limit the amount of “good time” credits they may earn toward early release.⁶² Another voter initiative responsible for overincarceration in California is the Gang Violence and Juvenile Crime Prevention Act of 2000 (Proposition 21), which extends sentences for many crimes, redefines other offenses to make defendants subject to additional enhancements, and makes it easier for prosecutors to charge young offenders in adult court, where longer sentences may be imposed.⁶³ Other initiatives contributing to California's prison crowding are the Victims' Bill of Rights of 1982 (Proposi-

60. See Order Denying Defendants' Motion to Stay, *supra* note 44.

61. PHILIP L. DUBOIS, LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS 80 (1998).

62. See SB 105 REPORT, *supra* note 6, at 9.

63. See *Proposition 21*, CAL. LEGIS. ANALYST'S OFFICE, http://www.lao.ca.gov/ballot/2000/21_03_2000.html, archived at <http://perma.cc/U8QF-8XAY>.

tion 8), which provides sentence enhancements above the original sentence for most felonies, and the Victims' Rights and Protection Act of 2008, or "Marsy's Law" (Proposition 9), which, among other things, restricts the availability of parole for twenty-five percent of California prisoners and constrains an important valve for the prison system to release inmates who no longer pose a threat to public safety.⁶⁴ A commission may also want to revise laws originally intended to reduce the state's prison population, including the Substance Abuse Treatment Act of 2000 (Proposition 36); the Three Strikes Reform Act of 2012 (also Proposition 36); and the Safe Neighborhoods and Schools Act (Proposition 47). Amendments to any of these laws would require voter approval.

Therefore the California legislature, advised by an expert and well-intended commission, could not enact comprehensive reforms to address prison and jail crowding in California even if it wanted to.

D. Voter Initiative

As discussed above, it is fair to assume that at least some of the changes that a commission would recommend in order to hit a statewide incarceration cap would entail reforms to laws that were enacted by voter initiative and realistically can only be amended by another ballot measure. Any proposal for a sentencing commission in California that fails to grasp this legal reality, in particular a commission that relies on the legislature to enact necessary reforms, is doomed to fail.⁶⁵

There is longstanding and widespread public support for the establishment of a commission in California—including endorsements from unlikely allies like the California prison guards' union, the ACLU, and almost every major newspaper in the state.⁶⁶ Despite this support, the political reality in California

64. See MARCH FONG EU & WILLIAM G. HAMM, CALIFORNIA BALLOT PAMPHLET, PRIMARY ELECTION, June 8, 1982, 32-35, available at http://librarysource.uchastings.edu/ballot_pdf/1982p.pdf, archived at <http://perma.cc/WF8A-JYR5>; Proposition 9, CAL. LEGIS. ANALYST'S OFFICE, http://www.lao.ca.gov/ballot/2008/9_11_2008.aspx, archived at <http://perma.cc/36CE-LWC9>.

65. See Barkow, *supra* note 7, at 789 (arguing that the sentencing commission established by the legislature in Oregon lacked effectiveness in part because voters could override and amend any changes made by the legislature).

66. See, e.g., Furillo, *supra* note 8; see also Editorial, *Broaden Scope of Prison Reform*, S. F. CHRONICLE, Aug. 10, 2006, <http://www.sfgate.com/opinion/editorials/article/Broaden-scope-of-prison-reform-2491538.php>, archived at <http://perma.cc/S342-JQNH>; Editorial, *Give Teeth to a Sentencing Commission*, FRESNO BEE, June 4, 2007; Editorial, *Gov. Brown Must Get Real on Prison Crowding*, SACRAMENTO BEE, Oct. 17, 2013, <http://www.sacbee.com/opinion/opn-columns-blogs/article2580045.html>, archived at <http://perma.cc/FB8N-UTJV>; Editorial, *supra* note 8 ("California needs a sentencing commission outside the political process to recommend sensible and balanced terms for offenses."); Editorial, *Our View: Needed Sentencing Reform in Prisons, California needs a commission to Give a thorough look at current laws*, MERCED SUN-STAR, Nov. 27, 2006; Editorial, *Prison Reform . . . Entire corrections system must change*, SAN DIEGO UNION-

is that the legislature is unprepared to enact the kind of comprehensive reform needed. If the State's failure to adequately respond to the three-judge panel is not evidence enough,⁶⁷ at a November 2014 public meeting at Berkeley Law sponsored by the National Academy of Sciences, State Senator Loni Hancock, who chairs the California Senate Public Safety Committee, dismissed out of hand the possibility that she could muster enough votes to enact a sentencing commission in California.⁶⁸ Likewise, at an address on Realignment in January, Governor Jerry Brown also said he was unlikely to support major legislation to correct the state's incarceration problems.⁶⁹

Another reason why a ballot measure is necessary for establishing an effective commission is that voters can amend the State Constitution by initiative, thereby avoiding any separation of powers or delegation of authority issues that may arise by authorizing a commission to reform sentencing statutes, even if the legislature has some veto authority.⁷⁰ Furthermore, a voter initiative to enact a comprehensive sentencing commission in California has a realistic chance at success. In addition to the broad institutional support noted above, at least one statewide poll conducted in 2013 shows that seventy-four percent of likely California voters would support an initiative that was "made up of criminal justice experts, to streamline California's criminal statutes with the goal of safely reducing prison costs and maximizing public safety."⁷¹

TRIBUNE, Sept. 1, 2006, http://www.utsandiego.com/uniontrib/20060901/news_lz1ed1top.html, archived at <http://perma.cc/HRV6-YNVC>; Editorial, *Time Running Out on Prison Reform*, SAN JOSE MERCURY NEWS, Sept. 11, 2007, http://www.mercurynews.com/opinion/ci_6860100, archived at <http://perma.cc/6MRQ-48UK>.

67. See Order Denying Defendants' Motion to Stay, *supra* note 44 (describing California's failure to comply with the Eighth Amendment despite the long history of litigation in both *Plata* and *Coleman*).

68. Berkeley Law, Chief Justice Earl Warren Institute on Law and Social Policy, *Discussion of National Academy of Sciences Report, The Growth of Incarceration in the United States: Exploring Causes and Consequences* (Nov. 19, 2014), http://www.kaltura.com/index.php/extwidget/preview/partner_id/1368891/uiconf_id/26354192/entry_id/0_c42cm7wc/embed/auto?.

69. See Katie Orr, *Brown Says Criminal Justice System Must Be Improved*, CAPITAL PUBLIC RADIO (Jan. 23, 2015), available at <http://www.capradio.org/articles/2015/01/23/brown-says-criminal-justice-system-must-be-improved/>, archived at <http://perma.cc/JKP8-W5P8> (reporting that the Governor acknowledged problems with the system, but said, "I'm not looking for massive new legislation").

70. Under California election law, state voters may amend the California Constitution by a simple majority vote if the issue is put on the ballot. The principal legal and mechanical difference between a ballot measure that amends the state constitution and a ballot measure that merely amends or adds state statutes is that the former requires the sponsor to collect more signatures from registered voters in order to put the issue on the ballot. For a simple summary of rules governing ballot measure qualification and elections, see CALIFORNIA SECRETARY OF STATE, *BALLOT MEASURES*, https://www.sos.ca.gov/elections/elections_j.htm, archived at <http://perma.cc/V83H-W6W3>.

71. David Binder Research, *CALIFORNIA VOTERS OVERWHELMINGLY FAVOR A VARIETY OF PROPOSALS THAT WOULD EASE PRISON CROWDING 1* (2013), available at

A successful ballot measure campaign enacting an effective and comprehensive commission will demonstrate to policymakers, judges, prosecutors and legislators that voters in California are serious about addressing the problem of over-incarceration. Indeed, a successful commission campaign will send a message across the country that “tough on crime” politics has run its course, and that voters genuinely want criminal laws that are evidence-based, effective at controlling crime, respectful of the dignity of those imprisoned, and provide genuine opportunity for redemption and reform.

CONCLUSION

My hope is that a sentencing commission along the lines described here will change the conversation about criminal justice from one of politics and ideological sound-bites (from both sides of the issue) to solutions based on data, risk analysis, and optimization of limited resources. We will never be able to conduct the sort of randomly controlled studies that could help isolate root causes of crime and the most effective responses, but thanks to scholars like Petersilia and Cullen we can come a lot closer than the system we currently have. A commission with a mandate to review the criminal system as a whole and authority to direct resources where they are most needed will not only reduce the prison population to constitutional and manageable levels but also certainly improve the efficacy of sentencing laws and thereby improve public safety.

I do not pretend that there are not dangerous people who commit unspeakably devastating crimes and remain threats to communities. I believe we need prisons and jails to shield the public from dangerous criminals, supply capacity for retribution, and provide deterrence. But when prisons and jails are not accomplishing these goals (and the evidence shows they are not) then they undermine any reasonable measure of justice. A core objective of our justice system, and those who study it, should be to minimize this harm.