

September 2010

The Quixotic Dilemma, California's Immutable Culture of Incarceration

Geri Lynn Green
Green & Green LLP

Follow this and additional works at: <http://digitalcommons.pace.edu/plr>

 Part of the [Criminal Law Commons](#), and the [Law Enforcement and Corrections Commons](#)

Recommended Citation

Geri Lynn Green, *The Quixotic Dilemma, California's Immutable Culture of Incarceration*, 30 Pace L. Rev. 1453 (2010)

Available at: <http://digitalcommons.pace.edu/plr/vol30/iss5/5>

The Quixotic Dilemma, California's Immutable Culture of Incarceration

Gerl Lynn Green*

Abuse of power has always fed on the sophisticated ignorance and postural unconcern of the people. The continuing problem with the California Department of Corrections is no exception. As Thomas Jefferson said, "information is the currency of democracy."¹ California desperately needs transparency *and* accountability to reinvigorate the active participation of its citizenry to demand responsible solutions to the problems in the California penal system.

California leads in many categories, some admirable, others dubious. Its gross state product ("GSP") is the largest in the country and in 2008 represented 13% of the gross domestic product ("GDP") of the United States.² Texas, with the second largest GSP, has approximately two-thirds the population of

* Gerl Lynn Green is a partner at the San Francisco-based law firm Green & Green, LLP. She specializes in trial and appellate litigation in federal and state courts. She has extensive experience with complex litigation in areas including civil rights, criminal, quasi-criminal actions including antitrust, RICO, tax fraud/money laundering and white collar crime, prisoner's rights, ADA, employment discrimination, unfair trade practices, contract, family law, attorney's fees litigation, and business torts. She has been an active Board Member of Legal Services for Prisoners with Children, and a member of the Bringing Human Rights Home Lawyer's Network. She has written reports and presented before United Nations bodies concerning human rights violations in U.S. prisons and has co-authored a manual on drafting shadow reports, entitled *Demanding Our Rights*.

1. ICON GROUP INT'L, INC., JEFFERSON: WEBSTER'S QUOTATIONS, FACTS AND PHRASES 391 (2008).

2. Bureau of Economic Analysis, Gross Domestic Product by State (GDP by State) Interactive Map, <http://www.bea.gov/regional/gdpmap/GDPMap.aspx> (last visited Mar. 21, 2010).

California³ and its contribution to the U.S. GDP is approximately two-thirds that of California.⁴ California alone is the eighth largest economy in the world,⁵ and regrettably has the distinction of being the third largest penal system in the world, behind only China and the United States Bureau of Prisons.⁶

Recent disclosures have revealed another distinction for California: its prisons. Despite an annual budget of nearly ten billion for the California Department of Corrections and Rehabilitation (a sum greater than the total revenue of thirty-of the States),⁷ California's prisons are run like those that might be found in the Third World.

In the federal district court case that put the California prison system into receivership, Judge Thelton Henderson found that the root cause of the problem was a "historical lack of leadership, planning, and vision by the State's highest officials during a period of exponential growth of the prison population."⁸ California's prison system, he found, was "a textbook example of how . . . political institutions sometimes fail to muster the will to protect a disenfranchised, stigmatized, and unpopular subgroup of the population."⁹ In California, the "failure of political will, combined with a massive escalation in the rate of incarceration over the past few decades, has led to a

3. The U.S. Census Bureau estimates that Texas had a population of 24,782,302 in 2009. U.S. Census Bureau, Texas—Population Finder, <http://www.census.gov> (select "Texas" under "Population Finder") (last visited Mar. 21, 2010). By contrast, California had an estimated population of 36,961,664 in 2009. *Id.* (select "California" under "Population Finder").

4. Bureau of Economic Analysis, *supra* note 2.

5. CTR. FOR CONTINUING STUDY OF THE CAL. ECON., 2008 CALIFORNIA ECONOMY RANKINGS 1 (2009), available at http://www.csce.com/PDF/Numbers-Aug09_2008-California-Economy-Rankings.pdf.

6. Amy E. Lerman, *The People Prisons Make: Effects of Incarceration on Criminal Psychology*, in *DO PRISONS MAKE US SAFER?: THE BENEFITS AND COSTS OF THE PRISON BOOM* 151 (Steven Raphael & Michael A. Stoll eds., 2009).

7. California Department of Corrections and Rehabilitation—Budget Management, <http://www.cdcr.ca.gov/Budget/index.html> (last visited Mar. 21, 2010). See also U.S. Census Bureau, States Ranked by Total State Taxes: 2009, <http://www.census.gov/govs/statetax/09staxrank.html> (last visited May 21, 2010).

8. *Plata v. Schwarzenegger*, 2005 WL 2932253, at *29 (N.D. Cal. Oct. 3, 2005).

9. *Id.* at *32.

serious and chronic abdication of State responsibility”¹⁰

Any analysis of California’s prison dilemma requires an understanding of the economic and political forces that brought us to this point. Fueled by U.S. expansion of its military-industrial complex with enormous development projects and construction,¹¹ California enjoyed its place in the sun, the Golden State where dreams really could come true.

Indeed, by 1945, the Federal Government was investing more than 10% of its spending in California, which at that time comprised 7% of the nation’s population.¹² After World War II, while most of the nation’s war industries reconverted to the production of consumer goods, California was the beneficiary of increased federal investment in the form of prime Department of Defense (DOD) contracts for its aerospace industry and electronics research and development. As a result, California received the highest dollar volume of prime DOD contracts of any state between 1958 and 1991.¹³ The growth of these DOD-spawned industries required the state to make immense investments in its own infrastructure to accommodate the resulting population expansion. New science/engineering-based jobs required a highly educated and specialized labor force, causing the state to craft and fund a “master plan” for higher education, which pledged an appropriate postsecondary education at public expense to every high school graduate.¹⁴

As a result, Californians enjoyed what appeared to be limitless employment opportunities, the nation’s best grade schools, affordable and accessible higher education, affordable housing, newly built infrastructure to provide the new population with hospitals and medical care, government agencies of every ilk, and hundreds of miles of roads and

10. *Id.*

11. BRUCE J. SCHULMAN, FROM COTTON BELT TO SUNBELT: FEDERAL POLICY, ECONOMIC DEVELOPMENT AND TRANSFORMATION OF THE SOUTH, 1938-1980, at 150 (1994).

12. See WALTON E. BEAN, CALIFORNIA: AN INTERPRETIVE HISTORY 425 (1973).

13. ANN R. MARKUSEN ET AL., THE RISE OF THE GUNBELT: THE MILITARY REMAPPING OF INDUSTRIAL AMERICA 13, 231 (1991).

14. Ruth Wilson Gilmore, *Decorative Beasts: Dogging the Academy in the Late 20th Century*, CAL. SOCIOLOGIST 14, 113-35 (1991); Richard Walker, *California Rages Against the Dying of the Light*, 209 NEW LEFT REV. 42-74 (1995).

freeways. In short, California offered an unparalleled lifestyle during the 1940s, '50s, and '60s, and it paid off, making California a significant global presence in its own right.

The hope for a better life drove an unprecedented wave of migration to California during and in the aftermath of WWII. Indeed, the population doubled in size to some 20 million in 1970, accounting for 1/10th of the nation, and grew to almost 25 million by 1980.¹⁵ As the century began to wane, however, the state's population swell began to take its toll.

Military spending cuts and reorganization in the late '60s resulted in significant, albeit temporary, middle-class job loss, causing the 1969-70 recession to hit California harder than the rest of the country and causing the unemployment rates to double.¹⁶ A confluence of a number of market forces over the ensuing decade stressed California's resources even further. OPEC price manipulation in the 1970s caused the price of oil to rise over twenty times what it was in the beginning of the decade. These fluctuations had wide-ranging and substantial inflationary effects on the United States and California economies.¹⁷ Legislation in August of 1971 caused the yen to rise 50% against the dollar from 1971 to 1985; this in turn caused the dollar to go into a free fall and spurred Japanese investment in California real estate. The 1974 Equal Credit Opportunity Act (ECOA)¹⁸ made it unlawful for any creditor to discriminate against any applicant, which allowed mortgage lenders to take into account all income-earning members of the household. Prior to this enactment, lenders had been confined to consideration of only the man's income. With the increased buying power of two household income earners, a new wave of buyers was suddenly unleashed to compete for available housing inventory. The global recession of 1973-1975, as well as high interest rates and the swelling labor pool, compounded the problem. The fall of Saigon on April 30, 1975—which

15. See CAL. DEP'T OF FIN., POPULATION OF CALIFORNIA AND THE UNITED STATES, 1940 TO 2007, at 2 (2008) available at http://www.dof.ca.gov/HTML/FS_DATA/STAT-ABS/documents/B1.pdf.

16. Michael B. Teitz, *The California Economy: Changing Structure and Policy Responses*, in CALIFORNIA POLICY CHOICES (John J. Kirlin & Donald R. Winkler eds., 1984).

17. OPEC BEHAVIOUR AND WORLD OIL PRICES 19 (James M. Griffin, David J. Teece eds., 1982).

18. Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2006).

ended the Vietnam War—prompted the first large-scale wave of immigration from Vietnam, which continued for the next decade. When the shah of Iran fell in January of 1979, California absorbed many of those Iranians who fled the Ayatollah Khomeini regime.

With all these forces at work, California experienced an unprecedented rise in the price of real estate and a corresponding reassessment of real estate taxes based on market value. California's municipal and state treasuries, which rely on property taxes, enjoyed substantial surpluses, with annual revenues exceeding expenditures. Alarmed taxpayers waged a revolt that resulted in the passage of Proposition 13 in 1978. Proposition 13 was a voter initiative that rolled the state residential and non-residential property taxes back to 1975 rates and shielded property from reassessment until it was sold.

California's municipal governments, heavily dependent on property tax revenues to fund services, were severely impacted. School districts that had previously received more than 50% of their budget from property taxes in 1978 saw those contributions reduced to only 18% by 1988.¹⁹ Similarly, local governments were forced to reduce services to their neediest residents: the poor, homeless, mentally ill, substance abusers, developmentally disabled, and children.²⁰

Conservative California politicians responded to these crises with political platforms to lower taxes, cut spending, and ensure law and order. With municipal budgets decimated, the state streamlined the process by warehousing offenders at state prisons instead of local facilities. Ideals of rehabilitating criminal offenders were replaced with models of incapacitation. Lawmakers hastily passed laws, dramatically increasing prisoner populations without providing funding for education, vocational training, and rehabilitative programming. At the same time, the state continued its deinstitutionalization of the mentally ill and the funds for their care dried up, forcing the shutdown of community facilities for the seriously mentally ill. Today, almost half of all prisoners are incarcerated for non-

19. Jeffrey Chapman I, *The Fiscal Context*, in 7 CALIFORNIA POLICY CHOICES (John J. Kirlin & Donald R. Winkler eds., 1984).

20. Poverty among California's children rose twenty-five percent. See Teitz, *supra* note 16.

violent, property, or drug crimes.²¹

Such a shift allowed the Department of Corrections to steadily grow and amass enormous political power. Today, it employs more than 66,000 staff members,²² more state employees than any other department; as such, it has a stranglehold on California politics.

I. The Present State of the California Prison System

The increased imprisonment of drug offenders and other low-level non-violent offenders, the dismantling of California's mental health system, and the trend toward imposing long prison sentences has caused California's inmate population to swell over 500% since 1980, when the average adult population hovered around 24,000,²³ to a whopping 170,000 in 2007.²⁴ At the same time, the general population of the state has only seen a 64% increase.²⁵

21. See CAL. DEP'T OF CORR. & REHAB., CHARACTERISTICS OF FELON NEW ADMISSIONS AND PAROLE VIOLATORS RETURNED WITH A NEW TERM (2008), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/ACHAR1/ACHAR1d2008.pdf.

22. See CAL. DEP'T OF CORR. & REHAB., CORRECTIONS: MOVING FORWARD 3 (2009), *available at* http://www.cdcr.ca.gov/News/2009_Press_Releases/docs/CDCR_Annual_Report.pdf.

23. See CAL. DEP'T OF CORR., HISTORICAL TRENDS INSTITUTION PAROLE POPULATION 1976-1996, at 3a (1997) *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/HIST2/HIST2d1996.pdf. The Institution population is 170,186, as derived from the Offender Base Information Systems (OBIS) dataset created on January 28, 2010. The data has been collected and reported for only the main institutions. See CAL. REHAB. OVERSIGHT BD., BIENNIAL REPORT app. B (2010), *available at* http://www.cdcr.ca.gov/Divisions_Boards/Adult_Programs/docs/C-ROB_Biannual_Report_March_15_2010.pdf.

24. See generally CAL. DEP'T OF CORR., *supra* note 23; CAL. DEP'T OF CORR. & REHAB., HISTORICAL TRENDS 1987-2007 (2007), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/HIST2/HIST2d2007.pdf.

25. See U.S. Department of Agriculture, California Fact Sheet, <http://www.ers.usda.gov/StateFacts/CA.htm> (last visited Apr. 16, 2010).

**California Population Trends According to the U.S.
Department of Agriculture:**

Population			
	Rural *	Urban *	Total
Year			
1980	569,423	23,098,342	23,667,765
1990	713,834	29,046,187	29,760,021
2000	796,198	33,075,450	33,871,648
2009 (latest estimates)	833,075	36,128,589	36,961,664

<http://www.ers.usda.gov/StateFacts/CA.htm> (last visited 4/18/2010.)

The Department of Corrections currently oversees thirty-three state adult prisons, eight juvenile facilities, more than forty minimum custody camps, twelve community correctional facilities, and several out-of-state private facilities.²⁶

The present number of inmates, 166,569,²⁷ is twice that which the prisons were built to hold²⁸ and more than double the number of inmates in 1989.²⁹ In some cases, prisons are

26. See CAL. DEP'T OF CORR. & REHAB., SUCCESSIONS AND CHALLENGES: THE CDCR STORY 3 (2009), available at http://www.cdcr.ca.gov/Reports_Research/docs/CDCR_Story_051807.pdf.

Throughout the state, there are more than 200 parole units and offices at nearly 100 locations serving adult and juvenile parolees. See *id.* This is in addition to nineteen re-entry centers and two restitution facilities that are operated by public or private agencies under CDCR contract. See *id.*

27. See CAL. DEP'T OF CORR. & REHAB., *supra* note 22, at 5.

28. *Coleman v. Schwarzenegger*, 2009 WL 2430820, at *1 (E.D. Cal. Aug. 4, 2009). *Plata v. Schwarzenegger*, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005) and *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995), were joined for hearings in the three-judge panel described herein.

29. See CAL. DEP'T OF CORR. & REHAB., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT JULY 31 1990 (1990), available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad9007.pdf. The 2009 figures do not take into account CDCR's forty camps, minimum custody facilities located in wilderness areas where inmates are trained as wild land firefighters; twelve community correctional facilities ("CCFs"); five prisoner mother facilities or the juvenile facilities which account for an additional seven to ten thousand prisoners. Furthermore, it does not take into account the parole and outpatient population which, as of December 31, 2008, was 123,597. See CAL. DEP'T OF CORR. & REHAB., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT DECEMBER 31 2008 (2009), available at

crowded to 300% of capacity.³⁰

The accelerated growth in the prison population and bureaucracy was not accompanied by the organizational restructuring necessary to meet increasing system demands and to provide appropriate accountability and oversight. The system today operates without necessary management structures, policy standardization, training information technology, or the ability to provide essential health care services and rehabilitative programming. Individual wardens wield extensive independent authority to determine standards and operating procedures and often act with impunity. A lack of accountability and transparency has created a “massive waste of taxpayer money.”³¹

A. *The State of Adult Corrections*

Plata v. Schwarzenegger and *Coleman v. Schwarzenegger* are two separate court actions that have resulted in federal court oversight of California prisons.³² The *Plata* plaintiffs, prisoners with serious medical needs, filed suit in 2001 claiming that the State failed to provide constitutionally-adequate medical care.³³ The State settled the matter in 2002 and entered a stipulation for injunctive relief to improve medical care. However, the defendants proved “incapable of or unwilling to provide the stipulated relief.”³⁴ Over the intervening years, the district court entered numerous orders to remedy the violations, each one proving ineffective.

The *Coleman* plaintiffs, prisoners with serious mental disorders, filed suit in 1990 alleging constitutionally inadequate mental health care.³⁵ After a trial, the district court found the California prison mental health care system so

http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad0812.pdf.

30. *Coleman*, 2009 WL 2430820, at *1.

31. There is widespread medical malpractice and neglect resulting in, on average, at least one needless inmate death every six to seven days. See *Plata*, 2005 WL 2932253, at *8.

32. *Coleman v. Schwarzenegger*, 2009 WL 2430820, at *1 (E.D. Cal. Aug. 4, 2009).

33. *Plata*, 2005 WL 2932253, at *1 (N.D. Cal. Oct. 3, 2005).

34. *Coleman*, 2009 WL 2430820, at *3.

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

deficient as to violate the Eighth Amendment.³⁶ The district court subsequently entered more than seventy orders over the course of fourteen years in a futile attempt to remedy the violations.³⁷ As in *Plata*, crowding prevented meaningful reform. The State has never sought to terminate the injunctive relief granted in either *Plata* or *Coleman* on the grounds that it has achieved constitutional compliance.

According to California Governor Arnold Schwarzenegger, the prisons are places “of extreme peril to the safety of persons.”³⁸ In 2006, the Governor declared a State of Emergency because the severe prison crowding “has caused substantial risk to the health and safety of the men and women who work inside [these] prisons and the inmates housed in them.”³⁹ He further declared that “immediate action is necessary to prevent death and harm caused by California’s severe prison overcrowding.”⁴⁰

Nonetheless, after almost twenty years of judicial oversight failing to improve the situation, the medical system was put into receivership by a federal court, and ultimately, on July 26, 2007, in the face of mounting deaths and inertia on the part of the defendants, the Chief Judge of the Ninth Circuit Court of Appeals ordered that a single three-judge court be convened to consider population reduction.⁴¹

The court found that one of the most visible consequences of the gap between the size of the prison population and the capacity of the prisons was the thousands of so-called “ugly” beds—thousands of double and triple bunks “crammed into gyms and dayrooms that were never meant to be used for housing.”⁴² The former head of the Texas Department of

36. *Id.*

37. *Coleman*, 2009 WL 2430820, at *13.

38. *Id.* at *1.

39. *Id.*

40. *Id.* at *23 (quoting Arnold Schwarzenegger, Cal. Governor, Prison Overcrowding State of Emergency Proclamation (Oct. 4, 2006)) (internal quotation marks omitted).

41. The three judge district court was convened and granted motions to intervene on behalf of defendants by certain California district attorneys, sheriffs, police chiefs, probation officers, counties, and Republican state legislators. *Id.* at 27. The court also granted the motion by the California Correctional Peace Officers’ Association, to intervene on behalf of plaintiffs.

42. *Id.* at *42.

Criminal Justice testified that “[i]n more than 35 years of prison work experience, I have never seen anything like it.”⁴³

Overcrowding, including “ugly” beds, is extraordinarily dangerous, according to the Governor’s emergency proclamation.⁴⁴ As described by a former high-ranking official in the California Department of Corrections and Rehabilitation, “the risk of catastrophic failure in a system strained from severe overcrowding is a constant threat. As the Director of the Division of Adult Institutions . . . , it is my professional opinion this level of overcrowding is unsafe and we are operating on borrowed time.”⁴⁵

On August 4, 2009, the three-judge district court panel issued its Opinion and Order, concluding after careful review and analysis of the evidence that plaintiffs had demonstrated that “clear and convincing evidence establishes that crowding is the primary cause of the unconstitutional denial of medical and mental health care to California’s prisoners.”⁴⁶ Thus, the court required the State to draft a plan to reduce the prison population.⁴⁷

In coming to this conclusion, the three-judge panel found that all of the steps defendants had taken under the *Plata*

43. *Id.* (internal quotation marks and citation omitted).

44. *Id.* at *42-43.

45. *Id.* at *34 (internal quotation marks and citation omitted).

46. *Id.* at 31. These barriers to medical and mental health care include lack of physical space and shortages of staff. The Court found that the crowded conditions themselves exacerbate prisoners’ mental illness. The mental health bed shortages:

have created a destructive feedback loop that is now endemic to the CDCR’s mental health care delivery system. Inmates denied necessary mental health placements are decompensating and are ending up in mental health conditions far more acute than necessary . . . creat[ing] a cycle of sicker people being admitted, with greater resources necessary to treat them, which then creates even further backlog in an already overwhelmed system.

Id. at *41 (internal quotations and citations omitted). The overcrowding also has the potential to cause physical illness, by increasing risk of transmission of infectious disease. Another result of crowding is that prison administrators rely heavily on lockdowns to exert control over the prisons resulting in further stress on the medical providers who must go cell to cell to deliver care. As a direct result of all of these problems caused by crowding, the Court found that there are unacceptably high numbers of both preventable and possibly preventable deaths. *Id.* at *32-56.

47. *Id.* at *115-116.

court's supervision, as well as the steps taken under the *Coleman* court's supervision, had failed to remedy the constitutional deficiencies.⁴⁸ That, the court determined, was due to "[t]he crushing inmate population [which] has strained already severely limited space resources to the breaking point, and crowding is causing an increasing demand for medical and mental health care services, a demand with which defendants are simply unable to keep pace."⁴⁹

The State answered with a proposal to build more prisons but that answer was rejected by the court as the evidence demonstrated that any construction could not be completed for many years, during which time plaintiff class members would continue to suffer and die.⁵⁰

The court considered other options, such as simply hiring more staff, but found that crowding impedes recruitment and retention of health care staff, and, even if more staff were hired, there would be nowhere for them to work.⁵¹

In conclusion, the court found that "[t]he evidence establishes that '[r]educing the population in the system to a manageable level is the only way to create an environment in which other reform efforts, including strengthening medical management, hiring additional medical and custody staffing, and improving medical records and tracking systems, can take root in the foreseeable future.'"⁵²

Before arriving at this conclusion, the three-judge panel carefully considered whether an order to reduce the prison population by up to 40,000, to 137.5% of design capacity, would have an adverse impact on public safety.⁵³ The court found that the crowded conditions in California prisons are actually increasing the crime rate because prisoners leave prison more dangerous than before.⁵⁴ This is because the crowded prisons

48. *Id.* at *115.

49. *Id.* at *61.

50. *Id.* at *102.

51. *Id.* at *45-46.

52. The Court, mindful of the problems inherent in such an order, did not order that CDCR "throw open the doors of its prisons." *Id.* at *78. On the contrary, it advised that the State come up with a plan where they "choose among many different options or combinations of options for reducing the prison population." *Id.*

53. *Id.* at *113-14.

54. *Id.* at *85-87.

force prisoners into violent, crowded conditions with higher-level offenders, and leave them unable to obtain rehabilitative programming because the physical space used for programming is now filled with beds.⁵⁵

The overwhelming evidence from local law enforcement officials was that “the current combination of overcrowding and inadequate rehabilitation or re-entry programming in California’s prison system itself has a substantial adverse impact on public safety and the operation of the criminal justice system.”⁵⁶ The State itself concurs.⁵⁷ All agree that reducing crowding will ameliorate these problems, thus improving public safety.

The court further noted that any reduction in the prison population would result in substantial savings to the State, possibly over one billion dollars, and the State’s population reduction plan could require some portion of those funds be directed toward community programs to ameliorate any impact of a prison population reduction.⁵⁸

At the time of this drafting, the State has failed to comply with the court’s order to produce a plan to reduce the prison population. Accordingly, lawyers for the prisoners are seeking prosecution of Governor Schwarzenegger for his failure to comply with the court’s order. The Governor has asked the court for more time to coax concessions from the Legislature, which failed to approve a package of Schwarzenegger-backed reforms in the summer of 2009 that could have slashed about 37,000 inmates from the state’s prisons.

The defendants continue to resist developing a plan and have appealed the order. On September 18, 2009, the State filed a population reduction plan. It was rejected by the court as the plan would not accomplish the population reduction ordered by the court. However, if implemented, the plan would reduce the prison population somewhat by giving more good-time credits and diverting certain parole violators and probation violators away from prison. A revised plan was filed by defendants on November 12, 2009. There continues to be

55. *Id.*

56. *Id.* at *85.

57. *Id.* at *85-86.

58. *Id.*

new developments in the efforts to reduce the severe overcrowding in California's state prisons. However, as of this writing, none have been implemented and none will dramatically change the overall prison population without serious revisions of California's sentencing scheme.

B. *The Juvenile Problem*

The juvenile justice system finds itself similarly situated, plagued by excessive violence, overcrowding, and a 91% recidivism rate.⁵⁹ In March 2006, a panel of state-approved correctional experts conducted a comprehensive assessment, which found a "system that is broken almost everywhere you look."⁶⁰

Youths are subject to being warehoused in huge living units with low staffing levels and are largely denied the educational and rehabilitative programming necessary for successful re-entry. Instead, the Department has capitulated to the gang culture with youths housed by gang affiliation, and the excessive use of lockdowns and isolation to manage violence. Because of the program reductions and the imposition of increased sentences for infractions, California minors' time in custody is almost triple the national average.⁶¹ Like its adult counterpart, the juvenile system provides inadequate medical and mental health care.

In January of 2007, CDCR reported that it housed 2,647 juveniles with 3,776 staff members, of which 1,970 were custody staff, at a rate of \$175,000 per year per juvenile.⁶² As of March 31, 2009, Department of Juvenile Justice (DJJ)

59. See CHRISTOPHER MURRAY ET AL., SAFETY AND WELFARE PLAN: IMPLEMENTING REFORM IN CALIFORNIA 6 (2006), available at http://www.cdcr.ca.gov/News/docs/DJJ_Safety_and_Welfare%20Plan.pdf.

60. *Id.* at 1.

61. With an average stay of 35.3 months, total per capita ward costs are nearly \$800,000, not including parole supervision costs. See CAL. DEP'T OF CORR. & REHAB., POPULATION OVERVIEW 2008 (2008), available at http://www.cdcr.ca.gov/Reports_Research/docs/research/POPOVER2008.pdf. See also CAL. DEP'T OF CORR. & REHAB., SAFETY AND WELFARE PLAN: IMPLEMENTING REFORM IN CALIFORNIA 1 (2006), available at http://www.cdcr.ca.gov/News/docs/DJJ_Safety_and_Welfare%20Plan.pdf.

62. California Department of Corrections and Rehabilitation, Summary Fact Sheet, www.cdcr.ca.gov/Reports_Research/summarys.html (last visited Mar. 25, 2010).

housed 1,637 wards in six institutions at an estimated cost of approximately \$234,029 per ward.⁶³ “With an average stay of 35.3 months, total per capita ward costs are nearly \$800,000, not including parole supervision costs.”⁶⁴ Despite the unprecedented expenditures by the CDCR/DJJ, there has been little progress in achieving reform and improving conditions.

While there are almost two highly-paid union staff members for every juvenile incarcerated at DJJ, California has one of the highest student–teacher ratios at 20.9 students per teacher compared to the national average of 15.5.⁶⁵ California has consistently fallen below the national average in per-pupil expenditures, ranking 24th in 2006–2007.⁶⁶ The state also ranked almost last in terms of the ratio of total school staff to students in 2006–2007, according to the National Center for Education Statistics (“NCES”): 72% of school staff members as the average State; 39% of district officials/administrators as the national average; and only 71% of school principals and assistant principals as the national average.⁶⁷

63. For the 2010 budget, see generally CAL. DEP’T OF CORR. & REHAB., GOVERNOR’S BUDGET (2010), *available at* <http://www.ebudget.ca.gov/pdf/GovernorsBudget/5210/5225.pdf>.

64. DANIEL MACALLAIR, MIKE MALES, & CATHERINE MCCrackEN, CTR. ON JUVENILE CRIMINAL JUSTICE, CLOSING CALIFORNIA’S DIVISION OF JUVENILE FACILITIES: AN ANALYSIS OF COUNTY INSTITUTIONAL CAPACITY 2 (2009), *available at* www.cjcj.org/files/closing_californias_DJF.pdf.

65. National Center for Education Statistics, Student/Teacher Ratios in Public Schools, <http://nces.ed.gov/programs/coe/2009/section4/indicator31.asp#info> (last visited Apr. 11, 2010). With almost 6.5 million kids in public school, California only has 307,000 teachers. *See also* Ed-Data Website, <http://www.ed-data.k12.ca.us/Navigation/fsTwoPanel.asp?bottom=/Articles/Article.asp%3Ftitle%3DHow%2520California%2520Compares> (providing student-to-teacher ratios in California public schools) (last visited Mar. 25, 2010). California had nearly 307,000 teachers in its schools in 2008-09. *See* Ed-Data Website, Teachers in California, <http://www.ed-data.k12.ca.us/articles/Article.asp?title=Teachers%20IN%20CALIFORNIA> (last visited Apr. 11, 2010).

66. NAT’L EDUC. ASS’N, RANKING AND ESTIMATES 2008-2009, at 67, 95-96 (2008), *available at* <http://www.nea.org/assets/docs/09rankings.pdf>. According to the National Education Association’s (“NEA”) Rankings and Estimates 2008–09 and unadjusted for regional cost differences, at \$9,124 per pupil, California was at 95% of the national average of \$9,565. *Id.*

67. EdSource, Staff-per-Pupil Ratios in California 2006-07, http://www.edsource.org/data_StaffPupilRatios0607.html (last visited Mar. 25, 2010).

With respect to teachers, California ranked 49th, with 74% as many as the national average.⁶⁸ It ranked 51st—last—on guidance counselors and librarians.⁶⁹ California had only 1.0 guidance counselor per 1,000 students, compared with an average of 2.1 nationally, and only 0.2 librarians per 1,000 students, compared with 1.1 nationally.⁷⁰

Like the adult facilities, the deplorable conditions in the juvenile facilities have been litigated for a number of years. Most recently, taxpayers filed suit in state court in the case of *Farrell v. Cate*.⁷¹ In an October 2008 hearing, Judge Jon Tigar, while presiding over the *Farrell* consent decree, grimly observed that after nearly four years of judicial intervention, the conditions that gave rise to the consent decree remained the same and “DJJ [was] in gross violation of the Court’s order.”⁷²

“In rebuking the state for its failure” to remediate the problems and comply with the consent decree, Judge Tigar pointed to the State’s failure:

to take even the most basic, foundational steps to implement reform. For example, the parties agree[d] that the DJJ is a policy-driven agency,

68. *Id.*

69. *Id.*

70. *Id.* The average teacher salary in California was \$63,640 in 2006–07, according to the NEA, higher than any other state. EdSource, California Rankings 2006-07, http://www.edsource.org/data_carankings06-07.html (last visited Mar. 25, 2010). The U.S. average was \$50,758. *Id.* However, the relatively higher cost of living in California is a significant factor. When comparing teacher salaries among states, both the cost of living in each state and the seniority of the workforce play a role. The American Federation of Teachers looked at average teacher salaries in 2000–01 and determined that when cost-of-living factors were taken into account, California ranked 16th in the nation. AM. FED’N OF TEACHERS, SURVEY & ANALYSIS OF TEACHER SALARY TRENDS 2001, at 19 (2002), available at <http://archive.aft.org/salary/2001/download/salarysurvey01.pdf>.

71. The case was originally filed under a different party name. *See* Consent Decree, *Farrell v. Hickman*, No. RG03079344, (Cal. Super. Ct. Jan. 31, 2005). *See also* GERI LYNN GREEN ET AL., CONDITIONS AND CONDUCT IN THE CALIFORNIA CRIMINAL JUSTICE SYSTEM: A REPORT ON U.S. GOVERNMENT COMPLIANCE WITH THE UNITED NATIONS INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) at n. xi (2006), available at http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/10c_California%20Prisons.pdf.

72. MACALLAIR, MALES & MCCracken, *supra* note 61, at 2 (internal citation omitted).

and the development of new policies is a prerequisite to implementation of reform. By its own witness' admission, however, DJJ ha[d] written only 12 policies in the last year out of the 800 necessary for implementation of the remedial plans—and not all of those 12 even relate to the remedial plans. DJJ has neither a date to develop the remaining policies nor a date to set a date to develop them.⁷³

The demonstrated inability of DJJ to institute mandated reforms despite unprecedented expenditures calls into question the wisdom of continuing the current course. Recent reports by California's nonpartisan Little Hoover Commission (LHC) and Legislative Analyst's Office (LAO) have called for the closing of the six remaining DJF institutions and transferring full responsibility for the delivery of juvenile justice services to county probation departments.

II. There Is No Magic Bullet

Because many factors have played a role in bringing California's penal system to this deplorable state, no one-dimensional answer, such as increased oversight, will remediate the tremendous problems facing the State. It must be noted that California, prior to this period, had evidenced an interest in promoting transparency and accountability in its penal system, being one of the only states to adopt a state regulatory scheme setting forth minimum standards of treatment of prisoners. Included therein was a state oversight body and comprehensive training systems.⁷⁴ However, the failure on the part of the state legislature to make these standards mandatory instead of merely permissive has severely reduced their effectiveness.

Moreover, California's sheer enormity is a natural obstruction to any meaningful oversight. The great distances of travel required to visit many of California's prisons keeps family and friends away. Lawyers rarely visit. Even with all

73. *Id.* at 2-3.

74. CAL. CODE REGS. tit. 15 (2010). *See also* CAL. PENAL CODE § 6030 (Deering 2009).

the monitors, experts, overseers, and ombudsman in place today as a result of the litigation, the necessity of traveling hundreds of miles to visit one institution is a significant barrier to regular and effective oversight. The great distance and costly telephone calls make it difficult for families to stay connected with loved ones; thus they continue to be uninformed. The remote placement of its prisons also makes it nearly impossible for charitable organizations, medical and mental health staff, or any non-department interns to work in the facility. Hence, California's Central Valley is dotted up and down with prison towns, virtually company towns in which there is little social or political will to buck the system. Hence, the institutions operate virtually behind a concrete veil of secrecy. This designed obscurity has been further exacerbated with an unprecedented expansion of the prison system.

Historically, judicial oversight through large class-action lawsuits served as one means for generating widespread systemic change, providing leverage over reluctant state legislators concerned about political capital, to provide needed resources.⁷⁵ However, with the passage of the Prison Litigation Reform Act (PLRA) in 1996, that sort of oversight became almost nonexistent. Specifically, federal lawsuits are now virtually impossible to file as a result of restrictive provisions and the substantial disincentives to qualified, experienced, competent lawyers to do this highly complex work, such as fee caps, the elimination of the catalyst theory which allowed for the recovery of attorneys' fees when the litigation resulted in significant change, and the requirement that the attorney fund the cost of experts even in the remedial phase of successful litigation.

The Department of Corrections employs one-fifth of California's state employees.⁷⁶ Those sixty-six thousand employees belong to a labor union, the California Correctional Peace Officers Association (CCPOA). In the mid-1980s, the CCPOA began an aggressive agenda to further promote prison

75. *Written Testimony Submitted to the Comm'n on Safety & Abuse in America's Prisons—4th Hearing* (June 2, 2006), available at http://prisoncommission.org/transcripts/public_hearing_4_day_2_f_litigation.pdf.

76. See U.S. Census Bureau, State Government Employment Data, <http://www2.census.gov/govs/apes/08stca.txt> (last visited Apr. 11, 2010).

expansion and ensure a growing inmate population, lavishing campaign contributions on friendly legislators and governors, with the inevitable resultant expansion of its membership and power.

In 1994, the union made history when it donated \$425,000 to Pete Wilson's gubernatorial campaign—the largest single donation in California history up to that time. After his election, Wilson rewarded the prison guards with hefty salary increases and harsher sentencing policies. In that same year, the “Three Strikes” sentencing enhancement initiative, strongly supported by CCPOA, was placed on the ballot.

In 1995, Governor Wilson rewarded the union when he pushed through trend-setting legislation to ban all journalists from interviewing any prisoners. California's relatively weak public-records law already prohibited the public and the media from inspecting a peace officer's personnel file without a court order or the permission of the police agency, which posed a significant obstacle to journalists trying to accurately determine and report on the facts concerning police or correctional officer misconduct. With the media banned from individual interviews of inmates, any meaningful transparency or accountability over the California Department of Corrections became nearly impossible.

In 1998, the union contributed a total of \$2 million to Gray Davis's campaign. As governor, Davis virtually surrendered control of all corrections matters to the CCPOA and its leadership. The union's remarkable influence over Davis and his administration became glaringly apparent in 2002 when he signed a new contract guaranteeing a 37.7 percent increase in guards' pay⁷⁷ at the same time that California was confronting the most serious fiscal crisis in recent history.⁷⁸

77. “Under this contract, a guard with seven years of service who earned \$53,000 per year would receive a yearly salary of \$73,000.” POLITICAL RESEARCH ASSOCS., PROFITS FROM INCARCERATION 219 (2005), available at <http://www.defendingjustice.org/pdfs/chapters/incarceration.pdf>. Today, with overtime and further raises guaranteed under the contract, guards can earn more than \$110,000 annually and all with only a high school GED. *Id.*

78. By 2002, approximately thirty-five percent of the CCPOA's yearly budget of \$22 million was dedicated to political activities, “including donations to elected officials. (The remaining \$14 million cover[ed] general operations such as the salaries of 71 full-time employees, including 20 attorneys).” Daniel Macallair, *Prisons: Power Nobody Dares Mess With*,

With the advent of term limits, the CCPOA has expanded its reach to local elections. By contributing to the campaigns of local candidates, the union is quietly building alliances with elected county officials on the assumption that many will ultimately serve in the Legislature.

This has had a profound effect on the prison system, as the California Legislature controls the allocation of funding for state prisons and the criminal justice system as a whole. Even funding decisions for local programs are often in the hands of the state legislators. Pleas to fund local programs that would divert low-level non-violent offenders or those suffering from mentally illness and substance abusers out of the state prison system have fallen on deaf ears. The budget today is so complex and convoluted that few people, if any, are qualified or able to engage in any sort of meaningful review of the allocation of state resources. Moreover, federal funding to local programs has been severely cut back over the years, leaving counties and municipalities without the means by which to treat, care for, and rehabilitate their own low-level offenders, mentally ill, and substance abusers.

It is not merely the prison system that finds itself in ruins today. California's entire political system has been rendered dysfunctional by what many are beginning to realize may be a misguided electoral process. The political will to engage in responsible governance has been so compromised by special interests that the Legislature has effectively been incapacitated; the leaders of the executive branch find themselves at odds with their own agencies and the state judiciary is now conflicted with the politicization of the bench.

While the availability of judicial intervention has been proven to be a necessity, it alone is not sufficient to ensure transparency and accountability. In 1995, a year before the PLRA passed, female prisoners filed a lawsuit challenging the grossly inadequate medical care at two California state prisons.⁷⁹ In 1997, a settlement was reached.⁸⁰ The California

SACRAMENTO BEE, Feb. 29, 2004, http://www.three-strikes-legal.com/prison_guard_union.html.

79. *Shumate v. Wilson*, No. 2:95-cv-00619-WBS-JFM (E.D. Cal. Apr. 4, 1995).

Department of Corrections (CDC) agreed to make improvements in the quality of health care at one of the women's prisons.⁸¹ However, the judicial monitors soon left and those changes were never made. In fact, the situation continues to worsen.

On a recent visit to San Quentin, Judge Henderson was taken aback at the depths to which San Quentin's medical facility was allowed to sink, even in the aftermath of his careful and productive judicial intervention in *Marin v. Rushen*.⁸²

What has become clear is that the bureaucracy's "entrenched paralysis"⁸³ is not a one-dimensional problem that a judge alone can solve by wielding the power of his pen. As the spate of litigation has proven over the past two decades, the courts are limited as to what they can do to ameliorate the problem. Beyond recognizing and identifying that the situation is dire and unconstitutional, and calling for change, the courts are without the necessary tools to solve the problem.

The problem, instead, is systemic and must be addressed in a holistic manner. Over the past three decades, we have passed laws criminalizing behaviors not previously resulting in prison commitments, while mandating and lengthening sentences as opposed to alternative methods, thereby ensuring a never-ending and increasing supply of prisoners. The politicization of the state courts over the last twenty-five years, together with the appointment of younger judges, many of whom come out of the prosecutorial ranks, who look upon the position as a career, as opposed to public service, has led to judges becoming wary of being demonized as "soft on criminals," which could make it more difficult to win reelection. Such a concern causes judges to be reluctant to exercise discretion in imposing alternative, or lighter, sentences even when they are afforded the opportunity.

Even if we reduced the prison population as the three-judge panel in *Plata/Coleman* has ordered,⁸⁴ with a politically

80. Amy Petré Hill, *Death Through Administrative Indifference: The Prison Reform Act Allows Women to Die in California's Substandard Prison Health Care System*, 13 HASTINGS WOMEN'S L.J. 223, 226 (2002).

81. *See id.*

82. *Marin v. Rushen*, No. 80-0012 (N.D. Cal. Mar. 10, 1982).

83. *Plata v. Schwarzenegger*, 2005 WL 2932253, *1 (N.D. Cal. 2005).

84. *See id.*; *Coleman v. Schwarzenegger*, 2009 WL 2430820 (E.D. Cal. Aug. 4, 2009).

compromised bench, harsh sentencing laws in place, and the lack of local solutions, the prisons will once again be busting at the seams in short order. As the laws are presently written, there will be a never-ending, exponentially growing supply of prisoners for a finite number of beds, staff and resources. Perhaps with the budget in crisis, the prisons running at 200-300% occupancy, schools closing, class sizes increasing, community colleges reducing classes, state college costs skyrocketing, local community hospitals being forced to close, cities and counties finding themselves forced into bankruptcy, and the infrastructure of California in severe disrepair after decades of deferred maintenance, we are at a tipping point.

Possibly, California will start to embrace the fact that the answer is not one-dimensional, but one requiring a comprehensive non-political or politicized approach. The enormity of the problems, admittedly, seems overwhelming and unmanageable. For instance, one of the realities is that decarceration will have a tremendous effect on unemployment. If we were to reduce the prison population by 50%, so that the prisons were running at 100% occupancy, we would release some 70,000-80,000 people into an already-strapped work force. This does not take into account the more than 30,000 CDCR employees who will no longer be necessary, not to mention the vast numbers of parole agents, administrators, and other positions in the criminal justice system who may be affected. Clearly, any meaningful reduction in prison population will severely affect the unemployment rate unless, of course, we redirect that labor pool somewhere else. However, both prisoners and CDCR staff are largely workers with low education levels, which exacerbates the problem. Up until now, inertia seemed the only answer, but with low-educated custody staff making over \$100,000 per year, and inmates costing \$50,000-\$230,000 per year, it might be time to look at alternatives. There are generally two means by which government can remove workers from the labor pool: incarceration and education. Californians are faced with a choice. Just as for every action there is a consequence, failure to act carries with it its own consequences.

Beds cannot be built, or facilities staffed, fast enough to accommodate the expanding numbers of prisoners. With the failure of the medical and mental health systems throughout

the state, as well as the lengthy prison commitments incarcerating people well into old age, the prison population is needier and far more expensive to care for than ever before.

We must first ask ourselves: do we want to continue to be the nation with the highest incarceration rate that the world has ever seen? Do we wish as a society to join the ranks of those we previously condemned, such as Russia's Gulag? Can we afford it? Do we want to continue to have well-kept prison facilities while we allow our children to attend schools crumbling from the decades of deferred maintenance? What other social goods will be defeated by continuing down this road? Are we willing to give up our world-class education system, our parks, our infrastructure, our basic quality of life here in California in order to imprison hundreds of thousands of people? If so, Californians may be in for much worse times. The budget crises we now are facing may be just the beginning.

California's tremendous success has been due in large part to the tremendous investment in education, which gave us a competitive edge on the world stage. Are we really willing to give up such a tremendous economic advantage in order to continue to incarcerate hundreds of thousands of our citizens when education, care and rehabilitation are far more cost-effective?

With the state Legislature held hostage by special interests, the court's hands tied with the passage of the Prison Litigation Reform Act, the media ban, and by the enormity of the California Department of Corrections, Californians, themselves, must stand up and demand accountability.

These are tough times, with a very rocky uncharted road ahead. But it is time we, as Californians, accepted our reality, took charge, and demanded that our government officials act responsibly in the State's best interest, instead of their own. Current awareness tells us we do not have a choice. Instead of searching for someone to blame and hoping for a quick fix, we must all ask ourselves what we might contribute to starting to reverse this process.

III. Conclusion

California has a difficult road ahead in the restructuring, rebuilding, and rethinking of its attitudes towards

incarceration and responsible governance. It will require vast reform, including not only in the prison-condition context, but also in the implementation of decarceration strategies. To do so, the political landscape must be reformed as well. This will only happen with an informed electorate. Transparency and accountability are the first steps that must be taken to garner the political will to make the necessary changes towards responsible democratic governance.