

# California Corrections: Confronting Institutional Crisis, Lethal Injection, and Sentencing Reform in 2007

Over the past several years, California has been awash in corrections reform, much of it mandated by legislation or the courts. The most significant developments have arisen in cases in the United States District Courts in California, which have ruled that compliance with the United States Constitution may require drastic restructuring of the prison system, sentencing guidelines, and lethal injection procedures.<sup>1</sup> In addition, California Governor Arnold Schwarzenegger has proposed and signed off on significant legislation and reforms to the corrections and rehabilitative structure of California's prisons and parole revocation measures.<sup>2</sup>

This article focuses on some of the most significant changes of the past several years in three major areas: (1) prison overcrowding, (2) lethal injection, and (3) sentencing and parole.

## I. CALIFORNIA'S PRISON CRISIS

[I]t is an uncontested fact that, on average, an inmate in one of California's prisons needlessly dies every six to seven days due to constitutional deficiencies in the CDCR's [California Department of Corrections and Rehabilitation] medical delivery system. . . . It is clear to the Court that this unconscionable degree of suffering and death is sure to continue if the system is not dramatically overhauled.

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1. See Sonja Steptoe, *California's Growing Prison Crisis*, TIME, June 21, 2007, available at <http://www.time.com/time/nation/article/0,8599,1635592,00.html?xid=feed-cnn-topics>; see also John Pomfret, *California's Crisis in Prison Systems a Threat to Public: Longer Sentences and Less Emphasis on Rehabilitation Create Problems*, WASH. POST, June 11, 2006, at A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/10/AR2006061000719.html>; LethalInjection.org, *Foreseeable Risk: Lethal Injection and the Three-Drug Protocol*, <http://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/LL/overview.html> [hereinafter Lethal Injection.org, *Foreseeable Risk*] (last visited June 14, 2008).

2. Joan Petersilia, Address, Governor Signs Historic Prison Reform Agreement (May 3, 2007) (transcript available at <http://gov.ca.gov/speech/6131>) [hereinafter Petersilia Address]; Press Release, Cal. Dep't of Corr. & Rehab., Gov. Schwarzenegger Signs Legislation to Create First Secure Community Re-entry Facility (Sept. 26, 2007) [hereinafter CDCR Press Release, Sept. 26, 2007], available at [http://www.cdcr.ca.gov/News/2007\\_Press\\_Releases/press20070926.html](http://www.cdcr.ca.gov/News/2007_Press_Releases/press20070926.html).

- Judge Thelton Henderson‡

For many years, California prisons have experienced such dramatic population growth and overcrowding that the situation is commonly referred to as a “crisis.”<sup>3</sup> This crisis has reached such epic levels that the courts, which are commonly the slowest legal mechanisms to instigate dramatic policy change, have emerged as reform agents via federal intervention.<sup>4</sup> This section will address the prison crisis, including an analysis of: (1) prison conditions and their fiscal impact; (2) executive action; (3); court involvement; and (4) legislation.

### *A. Prison Conditions and Their Fiscal Impact*

#### *1. Overcrowding*

Despite Governor Schwarzenegger’s promise to cut the prison population,<sup>5</sup> California continues to have the worst overcrowding in the country.<sup>6</sup> On any given day, California institutions contain 171,444 incarcerates,<sup>7</sup> and, as of December 26, 2007, these institutions were 201.5% over capacity.<sup>8</sup> Significantly, there is a distinction between institutional overcrowding and capacity levels in other facilities. As of December 26, 2007, camps were only slightly overcrowded, (104.9%), as were community correctional facilities (106.6%).<sup>9</sup> It is important to note, however, that prisons nonetheless accommodate approximately ninety-two percent of those persons within the California correctional system, and the prison system has experienced the greatest population growth in recent years relative to other facilities.<sup>10</sup>

Prior to the 1980s, the prison population increased by an average of 500 inmates per year, whereas from 1980 to 2006, the population increased by an average of 5500 inmates per year.<sup>11</sup> This growth amounted to an increase of

‡ Plata v. Schwarzenegger, No. C01-1351 TEH, 2005 WL 2932253, at \*1 (N.D. Cal. Oct. 3, 2005) (order appointing full-time Receiver).

3. See Steptoe, *supra* note 1; see also Pomfret, *supra* note 1.

4. Plata, 2005 WL 2932253, at \*1.

5. Pomfret, *supra* note 1.

6. *Id.*

7. CAL. DEP’T OF CORR. & REHAB., ADULT OPERATIONS—FOURTH QUARTER 2007 FACTS AND FIGURES, (2007) [hereinafter CAL. DEP’T OF CORR. & REHAB., ADULT OPERATIONS], available at [http://www.cdcr.ca.gov/Divisions\\_Boards/Adult\\_Operations/Facts\\_and\\_Figures.html](http://www.cdcr.ca.gov/Divisions_Boards/Adult_Operations/Facts_and_Figures.html).

8. CAL. DEP’T OF CORR. & REHAB., WEEKLY REPORT OF POPULATION AS OF MIDNIGHT, DECEMBER 26, 2007, 1 (2007) [hereinafter CAL. DEP’T OF CORR. & REHAB., WEEKLY REPORT], available at [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/WeeklyWed/TPOPIA/TPOPIAd071226.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOPIA/TPOPIAd071226.pdf).

9. *Id.*

10. CAL. DEP’T OF CORR. & REHAB., ADULT OPERATIONS, *supra* note 7.

11. LITTLE HOOVER COMMISSION, SOLVING CALIFORNIA’S CORRECTIONS CRISIS: TIME IS RUNNING OUT 17 (2007), available at <http://www.lhc.ca.gov/lhcdir/185/Report185.pdf>.

over 600% additional inmates per year.<sup>12</sup> From 1980 to 1997, California built twenty-one new prisons to accommodate more than 120,000 inmates.<sup>13</sup> In June 2005, an additional prison with nearly 3000 beds opened.<sup>14</sup> Yet this construction has been insufficient to keep up with the growing prison population.

In fact, the CDCR now emphasizes that prisons can actually accommodate prisoners beyond design capacity.<sup>15</sup> Design capacity is defined by the Commission on Accreditation for Corrections and the American Correctional Association as the number of inmates a prison was designed to accommodate.<sup>16</sup> Under this standard, allowable occupancy can include any combination of single-occupancy or double-occupancy cells, single or double-bunked multiple occupancy rooms, or dormitories.<sup>17</sup> The standards are set to ensure humane conditions, to prevent violence, and to increase safety.<sup>18</sup>

In California, however, design capacity is determined on the basis of a formula involving one inmate per cell, single bunks in dormitories, and no beds in spaces not designed for housing.<sup>19</sup> In 2006, total design capacity was 83,219, but CDCR contends that it can safely house approximately 150,000 inmates.<sup>20</sup> In this context, CDCR claims that only prisoners tripled-bunked and housed in hallways and classrooms contribute to problematic overcrowding.<sup>21</sup>

As of October 2007, nearly one out of ten of California's 173,000 inmates were living double- and triple-bunked in gymnasiums, dayrooms, and other spaces not intended for housing.<sup>22</sup> Additionally, overcrowding has forced the CDCR to house inmates of different security levels in the same location. For instance, approximately 6000 high security (Level IV) inmates currently occupy beds intended for Level III inmates.<sup>23</sup> Thus, overcrowding creates not merely an administrative difficulty, but a threat to health and safety.<sup>24</sup>

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[hereinafter LITTLE HOOVER COMMISSION].

12. *Id.*

13. *Id.* at 19.

14. CAL. DEP'T OF CORR. & REHAB., ADULT POPULATION PROJECTIONS, 2007-2012, 13 (2006) [hereinafter CAL. DEP'T OF CORR. & REHAB., ADULT POPULATION PROJECTIONS], available at [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Projections/F06pub.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Projections/F06pub.pdf); LITTLE HOOVER COMMISSION, *supra* note 12, at 19.

15. LITTLE HOOVER COMMISSION, *supra* note 11, at 17.

16. *Id.* at 19.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. LITTLE HOOVER COMMISSION, *supra* note 11, at 19.

22. Press Release, Cal. Dep't of Corr. & Rehab., CDCR Contracts for Additional Out of State Beds to Reduce Overcrowding (Oct. 5, 2007) [hereinafter CDCR Press Release Oct. 5, 2007], available at [http://www.cdcr.ca.gov/News/2007\\_Press\\_Releases/Press20071005.html](http://www.cdcr.ca.gov/News/2007_Press_Releases/Press20071005.html).

23. LEGISLATIVE ANALYST'S OFFICE, ADULT CORRECTIONS: WHO IS IN PRISON? ANALYSIS OF THE 2007-08 BUDGET BILL: JUDICIAL AND CRIMINAL JUSTICE (2007), available at [http://www.lao.ca.gov/analysis\\_2007/crim\\_justice/cj\\_05\\_anl07.aspx](http://www.lao.ca.gov/analysis_2007/crim_justice/cj_05_anl07.aspx).

24. LITTLE HOOVER COMMISSION, *supra* note 11.

## 2. Severely Inadequate Medical Care

Medical care in prisons has been under attack as well, due to medical incompetence, poor staffing, and outdated equipment:

The medical services provided by the CDCR are without question ‘broken beyond repair’ . . . . Almost every necessary element of a working medical care system either does not exist, or functions in a state of abject disrepair, including but not limited to the following: medical records, pharmacy, information technology, peer review, training, chronic disease care, and specialty services.<sup>25</sup>

Robert Sillen, the court-appointed medical receiver charged with bringing California prison health care up to constitutional standards, issued a letter and report on September 19, 2007, which revealed that inmates throughout the state suffered from delays in diagnosis, poor access to medical staff and tests, neglectful handling of medical records, and failure to recognize and treat serious medical conditions.<sup>26</sup> Unreasonable bureaucracy and underfunding of essential services, including the inability to obtain medical supplies, and the inability to enter into contracts with specialty providers in a timely and cost-effective manner, “has all but crippled the CDCR’s efforts to provide adequate health care.”<sup>27</sup> This is further complicated by the fact that prison populations are proportionately in greater need of medical care than the general population, and prisoners often wait until their illness has progressed substantially before seeking assistance.<sup>28</sup> As California State Senator Jackie Speier (D-San Mateo/San Francisco) described it:

To put it very bluntly, the health care system at CDC is sick. Twenty percent of the physicians that work at the CDC have either a bad mark on their record or a series of malpractice lawsuits—a figure that is four to five times higher than the general population of physicians in California.<sup>29</sup>

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25. ROBERT SILLEN, RECEIVER’S FIRST BI-MONTHLY REPORT 3, *available at* <http://clearinghouse.wustl.edu/chDocs/public/PC-CA-0018-0009.pdf> (filed in response to Court’s order in *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005) (order appointing full-time Receiver).) [hereinafter SILLEN REPORT].

26. Letter from Robert Sillen, Receiver, Cal. Prison Health Care Receivership Corp., to Staff, Cal. Dep’t of Corr. & Rehab. (Sept. 19, 2007), *available at* [http://www.cprinc.org/docs/resources/LetterFromReceiverVol2No4\\_091907.pdf](http://www.cprinc.org/docs/resources/LetterFromReceiverVol2No4_091907.pdf) [hereinafter Sillen Letter]. Judge Henderson removed Robert Sillen from his position on January 23, 2007 and replaced him with Clark Kelso, a professor at the University of the Pacific McGeorge School of Law, stating that Sillen had completed the first part of the necessary reform, but that a different style of leadership was required for the second step. *Judge Pulls Sillen from Prison Medical Receivership, Names Kelso*, S.F. BUS. TIMES, Jan. 24, 2008, *available at* <http://www.bizjournals.com/sanfrancisco/stories/2008/01/21/daily45.html>.

27. SILLEN REPORT, *supra* note 25, at 4.

28. *See All Things Considered: California Blasted for Poor Prison Health Care* (Nat’l Pub. Radio broadcast Oct. 14, 2004), *available at* <http://www.npr.org/templates/story/story.php?storyId=4109523>.

29. *Id.*

Additionally, overcrowding threatens the safety of prison staff and inmates and disrupts delivery of services.<sup>30</sup> Overcrowding, understaffing, staffing ineptitude, and prison gang culture have all been blamed for the fact that California's prison homicide and suicide rates are higher than the United States average for prisons.<sup>31</sup> In 2006, there were 426 deaths, including forty-three suicides.<sup>32</sup> Of those, eighteen deaths were deemed "preventable" with better medical management or care and an additional forty-eight were found to be "possibly preventable."<sup>33</sup> Six of the preventable deaths were from asthma.<sup>34</sup> Sillen stated: "When six inmates die of asthma in one year, we all know something is terribly wrong. No one should die of asthma in California in 2006, and yet, in its prisons, that is the number one cause of preventable deaths."<sup>35</sup>

Despite CDCR's attempts to better accommodate these inmates by increasing its staff, as of February, 2007, Sillen reported a twenty percent vacancy rate for primary case providers (doctors, nurses, and physical assistants).<sup>36</sup> Sillen also concluded the following in his first bi-monthly report:

[L]abor agreements, statutes, regulations, policies and procedures related to the State personnel system, Civil Service requirements, and the California State Personnel Board. . . [render it]. . . virtually impossible to effectively discipline and/or terminate State employees for poor performance, up to and including incompetence and arguably illegal behavior. . . . In addition, the lack of qualifications, training and, in some instances, competence of the above personnel has created a culture of incompetence and non-performance which, unfortunately, is more rewarded than not within State employment.<sup>37</sup>

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30. LITTLE HOOVER COMMISSION, *supra* note 11, at 19.

31. Studies nationwide also associate increases in suicide and homicide rates with increases in the age of the inmate population and sentence length, factors that certainly reflect current trends in California corrections. See JOAN PETERSILIA, CALIFORNIA POLICY RESEARCH CENTER, UNDERSTANDING CALIFORNIA CORRECTIONS 29-34 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/shsplij.pdf>; see also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SUICIDE AND HOMICIDE IN STATE PRISON AND LOCAL JAILS 3 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/shsplj.pdf>.

32. Sillen Letter, *supra* note 26.

33. *Id.*

34. *Id.*

35. *Id.*

36. Press Release, Rachael Kagan, Cal. Prison Health Care Receivership Corp., Receiver Raises Prison Physician Salaries: Action Will Improve Quality of Care, Aid in Recruitment of Doctors (Feb. 23, 2007), available at [http://www.cprinc.org/docs/press/pr\\_022307.pdf](http://www.cprinc.org/docs/press/pr_022307.pdf). CDCR has hired 60,512 medical and non-medical employees, with 50,372 working in institutions (including 32,252 peace officers), 3417 in parole, and 6723 in administration. CAL. DEP'T OF CORR. & REHAB., ADULT OPERATIONS, *supra* note 7.

37. SILLEN REPORT, *supra* note 25, at 5.

### 3. Union Impact on the Crisis

The California Correctional Peace Officers Association (CCPOA) has recently been at the forefront in seeking improvements in prison staffing. Mike Jimenez, President of the CCPOA, told the Little Hoover Commission in 2006: “We are stretched so terribly thin at this point in time.”<sup>38</sup> There is an average of 6.46 inmates per officer in California versus 4.47 nationally.<sup>39</sup> At the time of Jimenez’s statement, the CDCR was understaffed—requiring around 3900 additional correctional officers—and he expressed concern that the understaffing could lead to an inmate riot.<sup>40</sup> Jimenez claimed, “We are sitting on the edge of what NASA calls catastrophic failure.”<sup>41</sup>

Understaffing has led to volatile environments inside the institutions. In fact, California prisons are more violent than correctional systems in other states of comparable size.<sup>42</sup> For example, California prisons report double the number of assaults as the Texas system and nearly triple the number of assaults as the federal prison system.<sup>43</sup> Assaults are not only against inmates, but also against prison guards.<sup>44</sup> On average, nine California correctional officers per day are assaulted by inmates.<sup>45</sup> Such safety concerns motivated the CCPOA to file an amicus brief in *Plata v. Schwarzenegger* and to express support for recent legislation aimed at prison reform.<sup>46</sup>

In the amicus brief, CCPOA stressed that wardens were unable to fill vacancies despite the high salaries offered correctional officers and blamed CDCR for its near total failure to proceed with its mission to rehabilitate prisoners.<sup>47</sup> The union also made great attempts to block the passage of Assembly Bill 900, a bill which was intended to overhaul the current correctional structure and remedy the problem of overcrowding through prison construction and rehabilitative measures.<sup>48</sup> CCPOA employed teams of lobbyists who stated that prison expansion, without filling correctional officer

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38. LITTLE HOOVER COMMISSION, *supra* note 11, at 19 (testimony of Mike Jimenez, President of the CCPOA, June 22, 2006 and Oct. 26, 2006) [hereinafter Jimenez Testimony].

39. PETERSILIA, UNDERSTANDING CALIFORNIA CORRECTIONS, *supra* note 31, at 22.

40. Jimenez Testimony, *supra* note 38.

41. *Id.*

42. LITTLE HOOVER COMMISSION, *supra* note 11, at 19.

43. *Id.*

44. *Id.*

45. California Correctional Peace Officers Association, About Us, <http://www.ccpoa.org/aboutus.shtml> (last visited Mar. 9, 2008).

46. See Sasha Abramsky, *Prison Breakdown: Overcrowding Has Pushed California's Prison System to the Brink*, IN THESE TIMES, Oct. 22, 2007, available at [http://www.inthesetimes.com/article/3377/prison\\_breakdown/](http://www.inthesetimes.com/article/3377/prison_breakdown/); see also *Plata*, 2005 WL 2932253.

47. *Id.*

48. Assemb. B. 900, 2007-08 Leg., Reg. Sess. (Cal. 2007). For further discussion of the bill, see *infra* Subsection D, “Significant Legislation.” See generally Warren Ko, Summary, 2007 *California Criminal Legislation: Meaningful Change, or Preserving the Status Quo?*, 13 BERKELEY J. CRIM. L. 97, 97-105 (2008).  
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vacancies, would endanger staff.<sup>49</sup> Union spokesperson Ryan Sherman stated that the bill “was a farce, a scam perpetuated against California’s people. . . . It was designed to hoodwink the federal government that they were finally taking action to end the crisis. It’s not real. It’s not reform. It’s prison construction.”<sup>50</sup> Assembly Bill 900 passed the Assembly, however, by a 70-1 vote.<sup>51</sup>

Despite the CCPOA’s recent support for population caps and reform, which has been attributed to a change in leadership and political will within the union,<sup>52</sup> some observers claim that it was previously influential in prison and sentencing policy through its support of legislation that arguably aggravated the crisis and required the construction of many new prisons.<sup>53</sup> The CCPOA possesses this influence because it is one of the wealthiest and most powerful political action committees in the state, with approximately 31,000 members and the ability to spend millions of dollars to support political candidates and influence public opinion through advertising.<sup>54</sup> It dedicates nearly \$8 million of its annual budget to political lobbying.<sup>55</sup> For example, former Governor Gray Davis received over \$3 million in campaign contributions from the CCPOA<sup>56</sup> and arranged a contract that allowed CCPOA to reject policy reforms and have a role in hiring over seventy percent of the officers in individual prisons.<sup>57</sup>

In the 1990s, the CCPOA provided significant funding and expended a great deal of effort promoting the victims’ rights movement in California, assisting in the creation of and providing near total financial support to the Doris Tate Crime Victims Bureau and Crime Victims United of California.<sup>58</sup> These groups are considered some of the most influential actors in the criminal

49. Andy Furillo, *Guards Union at a Low Ebb: But Leader Says Recent Setbacks Don't Mean Group Has Lost Clout*, SACRAMENTO BEE, July 8, 2007, at A1, available at <http://www.sacbee.com/111/story/261820.html>.

50. Abramsky, *supra* note 46.

51. Furillo, *supra* note 49.

52. Interview with Jonathan Simon, Professor and Assoc. Dean for Jurisprudence and Soc. Policy, Univ. of Cal., Berkeley, School of Law, in Berkeley, Cal. (Oct. 9, 2007 and Jan. 29, 2008).

53. *Id.*; Univ. of Cal. Berkeley, Inst. of Governmental Studies, California Correctional Peace Officers Association, <http://igs.berkeley.edu/library/htCaliforniaPrisonUnion.htm> (last visited June 14, 2008). The CCPOA, however, has encouraged California politicians to limit the construction and operation of private prisons (which hire non-CCPOA members). Joshua Page, *Manufacturing Affinity: The Fortification and Expression of Ties between Prison Officers and Crime Victims*, J. OF CONTEMP. ETHNOGRAPHY 8 (2007) (published online but forthcoming in print), <http://jce.sagepub.com/cgi/rapidpdf/0891241607310731v1>.

54. Pomfret, *supra* note 1.

55. Daniel Macallair, *Prisons: Power Nobody Dares Mess With*, SACRAMENTO BEE, Feb. 29, 2004, available at <http://dwb.sacbee.com/content/opinion/story/8363129p-9292876c.html>.

56. Mark Martin, *Guards Union Corrupts Prisons, Report Finds*, S.F. CHRON., Jun. 25, 2004, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2004/06/25/MNG9I7BH5C29.DTL>.

57. Pomfret, *supra* note 1.

58. Page, *supra* note 53, at 13. HeinOnline -- 13 Berkeley J. Crim. L. 123 2008

justice arena today and have helped to elect many politicians, judges, and district attorneys who consider themselves “victim-friendly” and “tough on crime.”<sup>59</sup> In addition, the CCPOA has been blamed numerous times for engaging in actions that blocked reforms in the California correctional system.<sup>60</sup> It supported campaigns advocating longer prison terms and harsher sentencing for criminals.<sup>61</sup> For example, in 1994 the CCPOA made large contributions to the campaign for Proposition 184, the “Three Strikes” initiative, which provided for the long-term incarceration of repeat offenders.<sup>62</sup> Additionally, from 2003 to 2005, the CCPOA and anti-crime groups expressed disagreement with Schwarzenegger’s rehabilitation agenda, financing commercials that suggested rehabilitation and parole reforms would allow dangerous felons to return to the streets and portraying Schwarzenegger as soft on crime.<sup>63</sup>

Aside from political lobbying, the CCPOA has also been successful at increasing the salaries of its membership. In 2002, the CCPOA negotiated a contract with former Governor Gray Davis which entitled members to an average salary increase of more than ten percent per year over the course of five years, to an average of \$73,428 in 2006.<sup>64</sup> At present, California’s correctional officers are the highest-paid correctional officers in the nation—the average salary of a California correctional officer is \$59,000, which is fifty-eight percent greater than the national average.<sup>65</sup> Further, because of understaffing and opportunities to work overtime, CCPOA members are commonly able to earn salaries of more than \$100,000 a year.<sup>66</sup>

Due to the CCPOA’s vast power of persuasion and large lobbying budget, Roderick Hickman, former Secretary of the California Youth and Adult Correctional Agency, and others have claimed that the CDCR has effectively enabled the CCPOA to take over management of the prisons. Hickman finally resigned in February 2006 after discovering that Governor Schwarzenegger’s top aides had been meeting with union representatives without his knowledge, expressing frustration in his inability to be effective while the CCPOA was

59. *Id.*

60. E.g., Jaime Jansen, *California Prison Reform Watchdog Blasts Policy Reversals in State Government*, JURIST, June 22, 2006, available at <http://jurist.law.pitt.edu/paperchase/2006/06/california-prison-reform-watchdog.php>; Andy Furillo, *Contract Pits Guards vs. Governor*, SACRAMENTO BEE, June 12, 2005, at A1, available at <http://dwb.sacbee.com/content/politics/story/13052795p-13898482c.html>; Ina Jaffe, *Ruling Complicates California Prison Problems*, NPR, Feb. 21, 2007, available at <http://www.npr.org/templates/story/story.php?storyId=7513852>.

61. Macallair, *supra* note 55.

62. *Id.*

63. Univ. of Cal. Berkeley, *supra* note 53.

64. PETERSILIA, *supra* note 31, at 21.

65. *Id.*

66. *Id.*



afforded so much power.<sup>67</sup>

### *B. Executive Action*

Despite Governor Schwarzenegger's stated refusal to allow the CCPOA and other public-sector labor unions to participate in shaping policy<sup>68</sup> and his promise to reform California corrections,<sup>69</sup> he was forced to declare a state of emergency in October 2006.<sup>70</sup> On December 21, 2006, he proposed an eleven billion dollar reform proposal to expand the number of prison beds by a greater amount than his administration had previously proposed in the special legislative session in August 2006, which had reviewed a package of reform proposals that focused heavily on new prison construction to address the crisis.<sup>71</sup> The December proposal included 16,000 new beds in existing sites, 5000 to 7000 new secure re-entry beds, 10,000 medical and mental health beds, and 45,000 local beds.<sup>72</sup> This plan also proposed the voluntary transfer of inmates to other state facilities due to projected increases in population.<sup>73</sup>

In January 2008, the Governor's office projected that the average daily prison population would increase from 173,993 in 2007-08 to 177,021 in 2008-09, amounting to an increase of 1.7%.<sup>74</sup> The average daily parole population is expected to grow from 129,343 in 2007-08 to 133,061 in 2008-09, an increase of 2.9%.<sup>75</sup> These numbers reflect not only those who have committed new crimes, but also those who have violated parole, as the number of inmates who return due to parole violations is substantial (seventy percent).<sup>76</sup> In fact, California has the nation's highest recidivism rate.<sup>77</sup> The Governor's office projects that the "fiscal impact of the change in population in 2007-08 is an increase of \$13.3 million from the general fund and a decrease of \$45,000 from other funds. In 2008-09 the fiscal impact of this population change is an

67. Pomfret, *supra* note 1.

68. In response to Schwarzenegger's proclamation of non-support and refusal to take union funds, the CCPOA created alliances with other state worker unions, even though the CCPOA has historically defined itself in opposition to other organizations affiliated with the AFL-CIO. Page, *supra* note 53, at 29.

69. LITTLE HOOVER COMMISSION, *supra* note 11, at 2.

70. *Id.* at 4.

71. *Id.*

72. *Id.*

73. *Id.*

74. DEP'T OF FINANCE, GOVERNOR'S PROPOSED BUDGET FOR 2008-09, CORRECTIONS AND REHABILITATION 2 (2008) [hereinafter BUDGET 2008-09], available at <http://www.ebudget.ca.gov/pdf/GovernorsBudget/5210.pdf>.

75. *Id.*

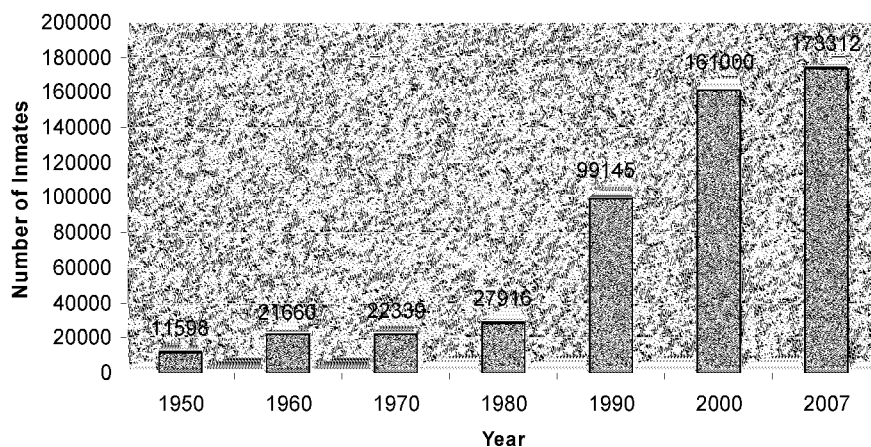
76. Madeleine Brand, *Interview with Pat Nolan, Former California Assemblyman* (NPR radio broadcast July 9, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=11826921>.

77. Pomfret, *supra* note 1; Pat Nolan, who was appointed to head Governor Schwarzenegger's "strike team" that is working towards the overhaul of California's approach to imprisonment, estimates that seventy percent of all inmates return to prison within three years of their release. Brand, *supra* note 76.

increase of \$58.5 million from the general fund and a decrease of \$459,000 from other funds.”<sup>78</sup>

This rate of expansion has come at a significant cost to the State.<sup>79</sup> In the early 1980s, when the bulk of the prison expansion began, adult and youth corrections amounted to four percent of California’s general fund expenditures (\$1 billion per year).<sup>80</sup> Today, it is eight percent of the general fund (around \$9 billion), and for 2007-08, Governor Schwarzenegger has proposed a budget of approximately \$10 billion.<sup>81</sup>

### California Prison Population



Source: Little Hoover Commission<sup>82</sup>

Even with construction of new facilities, there will be insufficient space to house all California inmates in-state. The 2007 budget included \$10 million in 2007 and \$13 million in 2008 to transfer 2260 inmates to prison facilities in Arizona, Oklahoma, and Tennessee at a cost of approximately \$63 per inmate per day.<sup>83</sup> However, in October 2007, CDCR estimated that the contract to

78. BUDGET 2008-09, *supra* note 74, at 2.

79. Michael Sung, *US Judges Reject Appeal of Federal Supervision of California Prisons*, JURIST, Aug. 1, 2007, available at <http://jurist.law.pitt.edu/paperchase/2007/08/us-judges-reject-appeal-of-federal.php>.

80. LITTLE HOOVER COMMISSION, *supra* note 11, at 21.

81. *Id.*

82. LITTLE HOOVER COMMISSION, *supra* note 11, at 18.

83. LEGISLATIVE ANALYST’S OFFICE, *supra* note 23. The Governor’s office once again dramatically changed budget predictions for out of state facilities in January 2008 to amount to a decrease of \$571,000 from General Fund in 2007-08 and an increase of \$14.5 million in General

transfer inmates out-of-state would cost \$67 million that fiscal year.<sup>84</sup>

On October 7, 2007, CDCR announced that it signed a second contract with the Correctional Corporation of America (CCA), valid through June 2011, to temporarily transfer an additional 3060 inmates out of the state at an estimated cost of \$48 million in 2007 alone.<sup>85</sup> When combined with preceding agreements, this amounts to 7772 out of state beds by April 2009.<sup>86</sup> CDCR Secretary James Tilton stated that the transfers “will allow for emergency beds in places like gymnasiums and dayrooms to be taken down, and increase access to medical and mental health care, and effective rehabilitation programs.”<sup>87</sup> As of December 26, 2007, 2055 inmates had been transferred.<sup>88</sup> CDCR anticipated that, by June 2008, 2050 of those inappropriate beds will be removed, with an additional 1750 by June of 2009.<sup>89</sup> In total, CDCR anticipated that 8000 inmates will be transferred by April of 2009.<sup>90</sup>

### C. Judicial Action

Despite administrative and legislative efforts at reform, advocates have brought a number of system-wide cases in which courts have found significant constitutional violations. Four recent cases are particularly important: *Plata v. Schwarzenegger*,<sup>91</sup> *Coleman v. Schwarzenegger*,<sup>92</sup> *Perez v. Tilton*,<sup>93</sup> and *Armstrong v. Davis*.<sup>94</sup> These cases represent a real change in prison litigation strategy from prison-specific to systemic challenges. Litigation about overcrowding has not been successful in the California courts, but these cases have revealed more evidence that overcrowding may create prison environments that are constitutionally unsustainable.

In all of these cases, plaintiffs sought the imposition of a population cap and a possible prisoner release order, which, under the federal Prison Litigation Reform Act (PLRA), can only be entered by a three-judge panel.<sup>95</sup> A “prisoner release order” under the Act includes “any order . . . that has the purpose or effect of reducing or limiting the prison population, or that directs the release

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Fund in 2008-09 to accommodate an additional 3000 inmates in a new facility in Arizona. BUDGET 2008-09, *supra* note 74, at 3.

84. CDCR Press Release, Oct. 5, 2007, *supra* note 22.

85. CDCR Press Release, Oct. 5, 2007, *supra* note 22.

86. *Id.*

87. *Id.*

88. CAL. DEP'T OF CORR. & REHAB., WEEKLY REPORT, *supra* note 8, at 1.

89. CDCR Press Release, Oct. 5, 2007, *supra* note 22.

90. *Id.*

91. *Plata*, 2007 WL 2601391 (N.D. Cal. Sept. 6, 2007) (order requiring Receiver to submit revised Plan of Action).

92. *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2007 WL 3020078 (E.D. Cal. Oct. 10, 2007) (order bifurcating proceedings and setting deadlines for Phase I).

93. *Perez v. Tilton*, No. C05-05241 JSW, 2006 WL 2433240 (N.D. Cal. 2006) (order granting motion for final approval of settlement).

94. *Armstrong v. Davis*, 275 F.3d 849, 856 (9th Cir. 2001).

95. 18 U.S.C. § 3626(a)(3)(B) (Deering 2008).

from or nonadmission of prisoners to a prison.”<sup>96</sup> The panel must convene hearings to determine whether, by “clear and convincing” evidence, crowding is the primary cause of the violation of the federal right and whether no other relief will remedy the violation.<sup>97</sup> If this standard is met, the panel may issue a prison release order.<sup>98</sup>

### **Sampling of Cases Impacting Current Corrections Policy and Practice**

#### **Pending**

**Plata v. Schwarzenegger** – Federal court placed California’s prison medical system under federal receivership.

**Coleman v. Schwarzenegger** – State court ordered a special master to comply with order to improve mental health care for mentally ill inmates at most California penal institutions.

**Armstrong v. Davis** – Federal court ordered the State to comply with the Americans With Disabilities Act during parole hearings.

**Perez v. Tilton** – Federal court ordered the State to provide adequate and timely dental care to all state inmates.

The three-judge panel is composed of Judge Stephen Reinhardt from the United States Court of Appeals for the Ninth Circuit, Judge Lawrence Karlton of the Eastern District of California, and Judge Thelton E. Henderson of the Northern District of California.<sup>99</sup> After an initial hearing, on October 10, 2007, the panel issued a seven-page ruling that bifurcated proceedings<sup>100</sup> and stated that the court “shall enter a prisoner release order only if the court finds by clear and convincing evidence that—(i) crowding is the primary cause of the violation of a Federal right [not to be subjected to cruel and unusual punishment]; and (ii) no other relief will remedy the violation of the Federal right.”<sup>101</sup>

Governor Schwarzenegger appealed the rulings in *Plata* that ordered federal supervision of California’s prison system, alleging that they were premature. However, two federal district judges separately ruled that, while the State may appeal orders by the special three-judge panel, it cannot appeal the rulings that created the panel.<sup>102</sup> Specifically, Judge Henderson and Judge

96. 18 U.S.C. § 3626(g)(4) (Deering 2008).

97. 18 U.S.C. § 3626(a)(3)(E) (Deering 2008).

98. *Id.*

99. *Coleman*, 2007 WL 3020078.

100. *Id.*

101. *Id.*; 18 U.S.C. § 3626(a)(3)(E).

102. *Plata*, 2007 WL 2306632, at \*1 (N.D. Cal. July 31, 2007) (order denying defendants’ motion for stay pending appeal).  
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Karlton rejected the Governor's claim that the panel's supervision might put the public in danger due to the early release of prisoners.<sup>103</sup> Therefore, it is the State's responsibility to provide an alternate solution to the capping of the prison population, whether through sentencing reduction or the shifting of populations into local jails or out of state in order to avoid large-scale release.

**Sampling of Cases Impacting Current Corrections Policy and Practice**

**Past**

***Farrell v. Tilton***, Alameda Co. Sup. Ct. No. RGO3079344 (2004) – State court ordered CDCR to improve virtually every aspect of the State juvenile justice system.

***Valdivia v. Davis***, 206 F. Supp. 2d 1068 (E.D. Cal. 2002) – Federal court ordered the State to provide due process protection to parolees returned to custody.

***Madrid v. Gomez***, 889 F. Supp. 1146 (N.D. Cal. 1995) – Federal court appointed special master to oversee prison with a history of excessive violence, cruel and unusual punishment, and substandard medical care.

***Toussaint v. McCarthy***, 597 F. Supp. 1388 (N.D. Cal. 1984) – Federal court declared conditions in segregated lock-up units in San Quentin, Folsom, Soledad, and Deuel Vocational Institute unconstitutional.

***Shumate v. Wilson***, No. CIV S-95-0619 (E.D. Cal. 2000) – Federal court ordered California to improve health care in reaction to claims of “deliberate indifference” to the needs of female inmates.

***Wilson v. Deukmejian***, No. 103454 (Cal. Sup. Ct. 1983) – State court ruled the conditions at San Quentin State Prison constituted cruel and unusual punishment and ordered immediate improvement.

In *Plata*, the United States District Court for the Northern District of California found that the quality of medical care in the state's prison system violated the Eighth Amendment's cruel and unusual punishment provision.<sup>104</sup> Judge Henderson wrote, “[T]he California prison medical care system is broken beyond repair. . . . [A]nd the threat of future injury and death is virtually guaranteed in the absence of drastic action.”<sup>105</sup>

*Plata* has been the most costly of the prison cases, and when it was settled in 2002, the Court directed the State to ensure that prison medical care was

103. *Id.* at \*2.

104. *Plata*, 2005 WL 2932253, at \*1.

105. *Id.* at \*1.

brought in compliance with constitutional standards.<sup>106</sup> However, when the State had failed to comply by 2005, Judge Henderson appointed a receiver, Robert Sillen, and the California Prison Health Care Receivership Corporation to take over reform efforts within the California prison system, effectively cutting off the State's ability to implement any of its own reforms.<sup>107</sup>

Judge Henderson wrote: "The Court has given defendants (the State) every reasonable opportunity to bring its prison medical system up to constitutional standards, and it is beyond reasonable dispute that the State has failed."<sup>108</sup> He concluded that "the CDCR leadership simply has been—and presently is—incapable of successfully implementing systemic change or completing even minimal goals toward the design and implementation of a functional medical delivery system."<sup>109</sup> This appointment of the receiver effectively bars the State, including the Governor, Legislature, and CDRC, from managing medical care operations in the prison system. The receiver estimates that it could take five to ten years to ensure that the prison system meets constitutional standards and at least that amount of time before the State will be able to take control of the system.<sup>110</sup>

Other class action lawsuits have attacked different aspects of health care, including mental health care services. In *Coleman v. Schwarzenegger*, a Special Master, J. Michael Keating, was appointed by United States District Court Judge Lawrence Karlton to oversee remedial efforts.<sup>111</sup> A similar case, *Perez v. Tilton*, addresses poor dental care and is currently pending before United States District Court Judge Jeffrey White.<sup>112</sup> Justices Henderson, Karlton, and White issued an order in January 2007 requiring the court-appointed representatives of the three cases to meet monthly to discuss and coordinate their efforts.<sup>113</sup> For those areas that overlap with each other, such as pharmaceutical care, medical records, information technology, and health services contracting, the Receiver will act as the lead manager to avoid redundant efforts and the waste of taxpayer money.<sup>114</sup> In addition, United States District Court Judge Claudia Wilken, who is presiding over *Armstrong v.*

106. Cprinc.org, Cal. Health Care Receivership Corp., About Us—CPR Description, <http://www.cprinc.org/about.htm> (last visited Mar. 9, 2008).

107. *Plata*, No. C01-1351 TEH (N.D. Cal. Feb. 14, 2006) (order appointing Receiver), available at <http://clearinghouse.wustl.edu/chDocs/public/PC-CA-0018-0015.pdf>.

108. *Plata*, 2005 WL 2932253, at \*1.

109. *Id.* at \*5.

110. Cprinc.org, Cal. Health Care Receivership Corp., FAQ's, <http://www.cprinc.org/faq.htm> (last visited Mar. 9, 2008) [hereinafter Cprinc.org FAQ's].

111. *Id.* Special masters are appointed by a judge to supervise the execution of orders issued by the court and ensure compliance.

112. *Id.*

113. *Plata*, No. C01-1351 TEH, at 2 (N.D. Cal. Jan. 26, 2007) (order requiring receiver, special master, and representative in *Coleman*, *Plata*, and *Perez* to meet on a monthly basis "for the purpose of working collaboratively on issues related to coordination of the remedies"), available at <http://www.clearinghouse.wustl.edu/chDocs/public/PC-CA-0018-0023.pdf>.

114. Cprinc.org FAQ's, *supra* note 110.

*Schwarzenegger*, a case regarding the rights of disabled inmates under the Americans with Disabilities Act (ADA), has joined efforts to repair the prison health care system.<sup>115</sup>

Court intervention has thus resulted in the creation of a parallel management and command structure. As Reginald Wilkinson, Chair of the National Institute of Corrections Advisory Board, wrote: "Observers assert this parallel management compromises the State's ability to attract the caliber of leadership that is required to turn around this complex organization."<sup>116</sup> In addition, taking the control out of the State's hands complicates its ability to budget effectively. Unfortunately, it will likely be several years before the State is able to take on responsibility for prison medical care.<sup>117</sup>

### *Lawsuit Compliance Budget*

In order to address the constitutional problems implicated in these cases, the State will have to spend hundreds of millions, or possibly even billions, of dollars.<sup>118</sup> CDCR claims that, in order to comply with court orders and lawsuits, the department was required to budget \$130 million for 2006-07 and \$278.9 million for 2007-08. This includes the cost of the health care receiver in *Plata v. Schwarzenegger*.<sup>119</sup> The projected annual budget for operating and capital expenses for 2006-07 was \$8.38 million, which would cover little more than salaries and contractors.<sup>120</sup> According to Sillen, however, the "biggest budgetary impact . . . will be financing the improvements that the receiver orders, which are expected to run in the billions of dollars over the course of the next several years."<sup>121</sup>

The *Farrell v. Tilton* consent decree requires additional spending from the CDCR Division of Juvenile Justice; therefore, to comply with the lawsuit, the Division budgeted approximately \$440 million, eighteen percent of the total budget for fiscal year 2006-07.<sup>122</sup> This means that the State would have spent approximately \$120,000 per incarcerated juvenile that year.<sup>123</sup> Finally, the

115. *Id.*

116. Reginald Wilkinson, Chair, Nat'l Inst. of Corr. Advisory Bd., Written Testimony to the Little Hoover Commission (Nov. 16, 2006) [hereinafter Wilkinson Testimony], in LITTLE HOOVER COMMISSION, *supra* note 11, at 10.

117. Cprinc.org FAQ's, *supra* note 110.

118. Civil Rights Litigation Clearinghouse, Featured Cases, <http://clearinghouse.wustl.edu/> (last visited Mar. 9, 2008).

119. DEP'T OF FINANCE, GOVERNOR'S PROPOSED BUDGET FOR 2007-08, CORRECTIONS AND REHABILITATION 2 (2007) [hereinafter BUDGET 2007-08] (on file with California's Department of Finance).

120. Sillen, *supra* note 25; see also Robert Sillen, Former Cal. Prison Health Care Receiver, Testimony to the Little Hoover Commission (Nov. 16, 2006) [hereinafter Sillen Testimony], in LITTLE HOOVER COMMISSION, *supra* note 11, at 9.

121. Sillen Testimony, *supra* note 120, at 9.

122. LITTLE HOOVER COMMISSION, *supra* note 11, at 9; BUDGET 2007-08, *supra* note 119, at 6.

123. *Id.* at 9-10.

2006-07 budget created positions for 4200 correctional officers to look after approximately 2700 wards and 3100 juvenile parolees.<sup>124</sup>

To implement these changes, the Budget Act of 2006 allots \$900,000 to allow CDCR to contract with correctional program experts and evaluate all California adult prison and parole programs that have been designed to lower rates of recidivism.<sup>125</sup> CDCR convened an expert panel including academics, current and former CDCR leaders, and re-entry program managers with experience in rehabilitation, education, correctional administration, psychology, and organizational development.<sup>126</sup> On June 29, 2007, the panel released a report that made eleven major recommendations, many of them relating to Assembly Bill 900. Some of the recommendations may be accomplished administratively, while others will require additional legislation.<sup>127</sup> The report includes recommended program models for in-prison rehabilitation, parole revocation risk assessment tools, and other methods to reduce recidivism and overcrowding.<sup>128</sup> The panel suggests that if all of its recommendations are adopted, population reductions could result in estimated annual savings of \$561 million to \$684 million, even after accounting for investment in rehabilitation facilities and programs.<sup>129</sup>

#### *D. Significant Legislation*

On May 3, 2007, Governor Schwarzenegger signed into law Assembly Bill 900, lauded as a “historic turning point for California.”<sup>130</sup> Governor Schwarzenegger projects that Assembly Bill 900 will prevent the capping of prison populations by authorizing a \$7.7 billion lease revenue bond for the construction of facilities to make room for up to 53,000 additional state prison and local jail beds.<sup>131</sup> It also provides the CDCR with temporary authority to transfer up to 8000 inmates out of state until the new facilities and programming are completed.<sup>132</sup> Construction is contingent upon the creation of programming designed to reduce recidivism and to reach certain construction and hiring benchmarks.<sup>133</sup> Assembly Bill 900 also authorizes pilot programs to provide training and counseling to parolees to enable their

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124. *Id.* at 10.

125. *Id.*

126. Press Release, Cal. Dep’t of Corr. & Rehab., Expert Panel on Corrections Reform Offers California a Roadmap for Reducing Recidivism and Overcrowding (June 29, 2007) [hereinafter CDCR Press Release, June 29, 2007], available at <http://www.cdcr.ca.gov/news/ExpertPanel.html>.

127. CDCR Press Release, June 29, 2007, *supra* note 126.

128. *Id.*

129. *Id.*

130. Petersilia Address, *supra* note 2.

131. Governor Schwarzenegger, Address, Governor Signs Historic Prison Reform Agreement (May 3, 2007) (transcript available at <http://gov.ca.gov/speech/6131>).

132. *Id.*

133. *Id.*



reentry into society.<sup>134</sup>

### **Assembly Bill 900**

**Phase I** authorizes \$3.6 billion in lease-revenue bond financing for 24,000 state prison beds, \$750 million for 8000 county jail beds and increased staffing. It also requires new facilities to provide individualized care in substance abuse treatment, work programs, incentivized academic and vocational education, and mental health care.

**Phase II** provides construction authorization subject to program conditions and benchmarks verified by a three-member panel comprising the state auditor, the inspector general, and an appointee of the Judicial Council, which would authorize \$2.5 billion in lease-revenue bond financing for the construction of space for 16,000 state prison beds and \$470 million for 5000 county jail beds. Conditions will be met if a significant amount of construction and rehabilitation set forth in Phase I has been carried out, including: the construction or siting of 4000 of the 12,000 “infill” beds that include rehabilitation programming space, the establishment of 2000 of the 4000 drug treatment slots, and a ten percent increase in educational program participation from April 2007.<sup>135</sup>

### *Recent Legislative Developments*

The California Legislature has proposed several bills to further the aims of Assembly Bill 900. Governor Schwarzenegger recently signed Senate Bill 943, which provides for the establishment of the first secure community re-entry facility in Stockton, California.<sup>136</sup> This facility, which is intended to rehabilitate prisoners, reduce recidivism, and ease overcrowding, will provide inmates who are close to their release date with counseling, education and GED coursework, vocational training and job placement, housing placement, and other services.<sup>137</sup> The Governor’s office views such re-entry facilities as a central part of Assembly Bill 900.<sup>138</sup>

Governor Schwarzenegger plans to build more re-entry facilities for returning inmates in local communities.<sup>139</sup> Senate Bill 943 calls for the addition of 16,000 beds in these facilities, with a maximum of 500 beds per facility.<sup>140</sup> The Governor’s office expects that these facilities will improve

134. Assemb. B. 900, 2007-08 Leg., Reg. Sess. (Cal. 2007). See generally Ko, *supra* note 48.

135. Assemb. B. 900.

136. S.B. 943, 2007-08 Leg., Reg. Sess. (Cal. 2007).

137. CDCR Press Release, Sept. 26, 2007, *supra* note 2.

138. *Id.*

139. *Id.*

140. *Id.*

public safety by re-uniting families and teaching employment skills.<sup>141</sup>

### *E. Other Components to the Crisis*

The Governor and CDCR are not the only parties responsible for the alleviation of the prison crisis. CDCR does not control the number of offenders sent to prison and has limited influence over prisoner release. Sentencing laws are created by the governor, the legislature and, increasingly, by ballot measures.<sup>142</sup> As Doctor Reginald Wilkinson, former director of the Ohio Department of Rehabilitation and Corrections, told the Little Hoover Commission, “You can’t succeed with just CDCR staff. You need the expertise of the departments of health, mental health, aging . . . all the resources already in place.” He added that, if the correctional system is failing, “it is not only the fault of CDCR, but the fault of California state government.”<sup>143</sup>

In reality, CDCR’s projections for the overhaul of California corrections facilities, procedures, and population are heavily dependent upon a number of independent factors, including sentencing laws, crime rates, and local criminal justice practices. Importantly, they do not account for the impact of a United States Supreme Court decision, *Cunningham v. California*, which requires California to reform sentencing procedures that allow courts to increase criminal sentences based on aggravating circumstances.<sup>144</sup>

## II. LETHAL INJECTION

All but one death penalty state employ lethal injection as the primary means of execution, preferring it to execution by hanging, firing squad, lethal gas, or electrocution.<sup>145</sup> However, courts across the country, and even the United States Supreme Court, have recently heard cases claiming that what is not gruesome to the spectator might be repugnant to the U.S. Constitution.<sup>146</sup>

At issue is the use of a three-drug protocol which incorporates two drugs that increase the risk that an inmate will consciously experience paralysis, suffocation, and excruciating pain during execution if he has not been sufficiently anesthetized by the first drug.<sup>147</sup> The petitioners in *Baze v. Rees*, which is currently before the United States Supreme Court,<sup>148</sup> stated in their

141. *Id.*

142. LITTLE HOOVER COMMISSION, *supra* note 11, at 11.

143. Wilkinson Testimony, *supra* note 116, at 12.

144. 127 S. Ct. 856 (2007). See generally Casey McTigue, Note, *The Problem of Post-Cunningham Judicial Review: The Impact of Gall, Kimbrough, and Senate Bill 40 on California Sentencing*, 13 BERKELEY J. CRIM. L. 201 (2008).

145. Sarah Tofte, *Worse Than We Thought*, HUMAN RIGHTS WATCH, Oct. 13, 2006, <http://hrw.org/english/docs/2006/10/13/usdom14388.htm>.

146. Lethal Injection.org, Foreseeable Risk, *supra* note 1.

147. *Id.*

148. For further information on *Baze v. Rees*, see Amanda Denker, Summary, *Developments in California Criminal Law*, 13 BERKELEY J. CRIM. L. 134 (2008).

brief:

[A] condemned prisoner injected with pancuronium and potassium will suffer torturous pain and agonizing death if the prisoner has not been properly anesthetized—but will be unable to alert anyone to this suffering, and will appear serene and comfortable to the executioners and other observers while enduring an excruciating death.<sup>149</sup>

The inmate is first administered sodium thiopental, an ultra-short-acting barbiturate and anesthetic used to bring on unconsciousness.<sup>150</sup> The next drug administered, pancuronium bromide, paralyzes all of the subject's muscles, including the diaphragm, which controls breathing.<sup>151</sup> Pancuronium bromide is not a sedative and does not affect the ability to feel pain.<sup>152</sup> It was developed to control the natural muscle spasms that occur from chemically induced death, ensuring that the act is less unsightly to those viewing the execution.<sup>153</sup> However, if the subject is not fully unconscious when the second drug is administered, he will suffocate for several minutes and be unable to express the fact that he is suffocating to death. Finally, potassium chloride, the third drug, is intended to cause cardiac arrest and death. If the subject is not unconscious, however, this drug "causes excruciating pain, likened to setting one's veins on fire."<sup>154</sup>

The threat of botched procedures is aggravated by the fact that lethal injections are often performed by non-medical personnel who lack the training required to ensure that they can carry out an execution that does not violate the Eighth Amendment's prohibition against "cruel and unusual punishment."<sup>155</sup> This risk is not merely theoretical, but has been observed in botched executions across the country, as shown in cases brought in the lower courts nationwide.<sup>156</sup> For example, a California doctor observed four executions in which prisoners' chests moved up and down for a long time after the injections had been administered.<sup>157</sup>

While members of execution teams practice the lethal injection procedure, they are not trained to respond to potential problems in application. Some members of execution teams claimed they had never practiced mixing sodium pentothal, and within one four-member team, no one agreed on the correct quantity of anesthetic or number of syringes.<sup>158</sup> Nor does the written protocol

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(2008).

149. Baze v. Rees, 2007 WL 3307732 (U.S. 2007) (No. 07-5439), Brief for Petitioners at \*28.

150. Lethal Injection.org, Foreseeable Risk, *supra* note 1.

151. *Id.*

152. *Id.*

153. Timothy Kaufman-Osborn, Former President, ACLU Washington, Address at University of California, Berkeley School of Law (Oct. 24, 2007).

154. Lethal Injection.org, Foreseeable Risk, *supra* note 1.

155. *Id.*

156. *Id.*

157. Tofte, *supra* note 145.

158. *Id.*

include guidelines on how to mix the drugs; instead, “they are posted on the wall of the room where the executioners work—a darkened room lit only by one dim red bulb.”<sup>159</sup>

### A. United States Supreme Court Decisions

Since the Supreme Court’s decisions in *Nelson v. Campbell*<sup>160</sup> and *Hill v. McDonough*,<sup>161</sup> in 2004 and 2006 respectively, a number of civil rights lawsuits have emphasized the risks in the current practice of lethal injection.<sup>162</sup> In *Nelson v. Campbell*, the Supreme Court held that section 1983 actions under Title 42 of the United States Code could be brought to challenge a state’s use of a surgical procedure during a lethal injection execution.<sup>163</sup> In *Hill v. McDonough*, the Supreme Court also held that Eighth Amendment challenges to lethal injection procedures could be pursued under Section 1983 and would not be viewed as successive habeas petitions.<sup>164</sup>

Finally, the Supreme Court’s recent grant of certiorari to *Baze v. Rees*, which challenges the lethal injection method used in Kentucky, has put what some call an effective “moratorium” on lethal injection in nearly every state.<sup>165</sup> The method in question is the three-chemical cocktail used for lethal injection in most states, including California, which some claim amounts to cruel and unusual punishment.<sup>166</sup> The two-part question presented to the Court is: (1) “[w]hat legal standard must be applied to lethal injection challenges in trial courts across the country,” and (2) “whether Kentucky’s protocol for carrying out lethal injection violates the Eighth Amendment’s ban on cruel and unusual punishment.”<sup>167</sup>

The plaintiffs in *Baze* are seeking an injunction that will prevent the state from executing condemned inmates according to a protocol that they allege creates an unnecessary risk of suffering.<sup>168</sup> However, the case does not foreclose the possibility of execution by other means or by lethal injection

159. *Id.*

160. 541 U.S. 637 (2004).

161. 547 U.S. 573 (2006).

162. Lethal Injection.org, Foreseeable Risk, *supra* note 1.

163. 541 U.S. 637.

164. 547 U.S. 573; Lethal Injection.org, Foreseeable Risk, *supra* note 1.

165. 217 S.W.3d 207 (Ky. 2006); James Vicini, *Lawyers' Group Urges Death Penalty Moratorium*, REUTERS, Oct. 29, 2007, available at <http://www.enn.com/lifestyle/article/24141>. Professor Semel, Director of the Death Penalty Clinic of the University of California, Berkeley, School of Law noted, “[I]t would be inaccurate and very presumptuous to call this a moratorium.” Linda Greenhouse, *Supreme Court Memo: Deciphering the State of the Death Penalty*, N.Y. TIMES, Oct. 19, 2007, at A21, available at <http://www.nytimes.com/2007/10/19/washington/19scotus.html>. Rather, she said, “what we’re seeing is a combination of different courts, and different executives, deciding to be prudent” while awaiting the Supreme Court’s decision. *Id.*

166. Vicini, *supra* note 165.

167. Lethal Injection.org, Foreseeable Risk, *supra* note 1.

168. *Id.* HeinOnline -- 13 Berkeley J. Crim. L. 136 2008

using different chemicals.<sup>169</sup> The Supreme Court heard arguments in *Baze* in January of 2008 and will likely render a decision before the end of June 2008.<sup>170</sup>

### *B. California Federal Court Decision*

Even before the Supreme Court took up this issue, in *Morales v. Tilton*,<sup>171</sup> a Federal District Court in California declared California's lethal injection protocol invalid because it did not comply with the Administrative Procedures Act. As a result, California executions have been indefinitely postponed while the court determines whether lethal injection may be considered cruel and unusual punishment.<sup>172</sup>

In a preliminary decision, United States District Court Judge Jeremy Fogel stated that the current death penalty system carries an unnecessary risk of suffering and urged the Governor's office to amend the lethal injection protocol.<sup>173</sup> In response, Governor Schwarzenegger immediately created a committee to "correct court-identified deficiencies in California's lethal injection protocol to ensure the death penalty procedure is constitutional."<sup>174</sup>

After deliberation by the committee, the CDCR proposed modifications to the capital punishment procedure on May 15, 2007.<sup>175</sup> It included the construction of a new execution chamber, but its "revised" protocol for the

169. *Id.*

170. Vicini, *supra* note 165. Prior to the publication of this article, and after its written completion, on April 16, 2008, a decision was reached in *Baze* upholding Kentucky's lethal injection protocol. *Baze v. Rees*, No. 07-5439, 2008 WL 1733259 (U.S. 2008). Chief Justice John Roberts ruled that future challengers must prove that a state's method not only "creates a demonstrated risk of severe pain," but also presents a "substantial" or "objectively intolerable" risk of serious harm. *Id.* at \*10, \*16 (U.S. 2008).

171. *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. Dec. 15, 2006) (order providing a memorandum of intended decision and requesting a response from the defendants). *Morales* was sentenced to death by lethal injection for the 1983 rape and murder of seventeen-year-old Terri Winchell. Linda Yee, *Morales Case Forces Courts to Revisit Injections*, CBS 5, Feb. 22, 2006, [http://cbs5.com/deathrow/local\\_story\\_053185932.html](http://cbs5.com/deathrow/local_story_053185932.html). The Administrative Procedure Act would require CDCR to ensure that its protocols do not conflict with state or federal laws and would be required to keep the public apprised of proposed changes. CAL. GOV'T CODE § 11346.3-.4 (West 2008).

172. Death Penalty Information Center, *Lethal Injection: National Moratorium on Executions Emerges After Supreme Court Grants Review*, <http://www.deathpenaltyinfo.org/article.php?did=1686#cal>. This comes at a time when California plans to create new death row facilities at San Quentin—a project that is estimated to cost \$337 million. This facility will have 768 cells, with a capacity for 1152 male inmates. LEGISLATIVE ANALYST'S OFFICE, *supra* note 23. There are numerous advocates who propose that the facilities should be moved elsewhere as construction of the facility in the San Francisco Bay Area will be nearly twice as costly as construction costs for complexes in other California locations. *Id.*

173. *Morales*, 465 F. Supp. 2d at 981-83.

174. Brett Murphy, *Schwarzenegger Proposes New California Death Penalty Protocol*, JURIST, May 16, 2007, available at <http://jurist.law.pitt.edu/paperchase/2007/05/schwarzenegger-proposes-new-california.php>.

175. *Id.*

lethal injection procedure called for the use of the same three chemicals.<sup>176</sup> The committee considered and rejected the use of one chemical that virtually eliminates pain and brings on nearly instantaneous death.<sup>177</sup> Because the CDCR's revised protocol did not address Judge Fogel's concerns, he has not changed his position since his Memorandum of Intended Decision, which proclaimed the lethal injection procedure unconstitutional.<sup>178</sup> In addition, Judge Lynn O'Malley Taylor of the Superior Court of Marin County declared the new lethal injection protocol invalid on October 31, 2007 because the execution protocol was enacted without review, which normally includes public notice, comment, and examination by a state office.<sup>179</sup>

While the issues in *Morales v. Tilton* are not identical to those before the Supreme Court in *Baze*, the Supreme Court's decision will almost certainly affect the district court's legal analysis and holding in *Morales* regarding the legality and application of lethal injection.<sup>180</sup> In the meantime, Judge Fogel has granted a joint request to stay discovery and vacate the case management schedule in *Morales v. Tilton* until a later date.<sup>181</sup>

### III. SENTENCING AND PAROLE

#### *A. Historical Perspective*

In the 1950s, 1960s, and 1970s, California was one of the first states to support the idea that states could treat individual offenders through education and use of psychotherapy.<sup>182</sup> "California was leading the rest of the nation," said John Irwin, a professor of criminal justice at San Francisco State University.<sup>183</sup> One of the most notable results of such treatment was indeterminate sentencing, which set guidelines but allowed judges and parole boards to decide, when given a range of years or months, whether the offender

176. *Id.*

177. This method has not been tested, however. Kaufman-Osborn, *supra* note 153.

178. LethalInjection.org, *Baze v. Rees*: Q&A, <http://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/LI/qa.html> (last visited June 15, 2008); *Morales*, 465 F. Supp. 2d 972.

179. *Morales v. Cal. Dep't of Corr.*, No. CV061436 (Super Ct. Marin Cty. Oct. 31, 2007) (order declaring lethal injection protocol invalid), available at <http://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/Public/orders/California/2007.10.31.ca.morales.apaorder.pdf>; see also Bob Egelko, *Marin Judge Rules Lethal Injection Procedures Invalid*, S.F. CHRON., Nov. 1, 2007, at B3, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=c/a/2007/11/01/BA49T444S.DTL>.

180. *Morales v. Tilton*, No. 5-6-cv-219-JF-RS, 5-6-cv-926-JF-RS (N.D. Cal. Sept. 27, 2007) (order following grant of certiorari in *Baze v. Rees*), available at <http://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/Public/orders/California/2007.09.27.ca.morales.postbaze.pdf>.

181. *Morales*, (N.D. Cal. Nov. 6, 2007) (order granting parties' joint request to vacate case-management schedule), available at <http://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/LI/documents/courtorders/california/2007.10.31.ca.morales.apaorder.pdf>.

182. Pomfret, *supra* note 1.

183. *Id.*

had sufficiently reformed and should be released.<sup>184</sup>

This emphasis on rehabilitation began to change in 1977. Responding to worries about rising crime, Governor Jerry Brown (D) supported the California legislature's Determinate Sentencing Law (DSL).<sup>185</sup> During the following decade, California's legislature passed more than 1000 laws increasing mandatory prison sentences, culminating in 1994 with the enactment of the Three Strikes law, which mandates a twenty-five-year-to-life sentence for most offenders with two previous serious convictions.<sup>186</sup>

Prisons subsequently expanded to accommodate the resulting influx of prisoners.<sup>187</sup> As Franklin Zimring, a professor at the University of California, Berkeley, School of Law, described, when the prison population grew and efforts at rehabilitation stagnated, the Department of Corrections became an organization with "no other pretensions but human warehousing."<sup>188</sup>

### B. A New Era

When Governor Schwarzenegger took office in 2003, he introduced a new philosophy on corrections, claiming that he would make prison reform a top priority.<sup>189</sup> On his second day in office, Schwarzenegger appointed Roderick Hickman, a former prison guard with a reputation as a reformer, to lead the department.<sup>190</sup> At the time, Schwarzenegger asserted, "Corrections should correct."<sup>191</sup> In 2005, Hickman reorganized the California prison system, changing the name of the Department of Corrections back to its pre-1981 name, the Department of Corrections and Rehabilitation.<sup>192</sup>

One of Hickman's first acts in office was to settle *Valdivia v. Schwarzenegger*, a lawsuit challenging the loss of due process rights before and during parole revocation hearings.<sup>193</sup> The resulting consent decree required the state to institute parole diversion programs in addition to other measures.<sup>194</sup>

184. *Id.*

185. Jonathan Curiel, *The Reincarnation of Jerry Brown: State's Former Governor Just Keeps on Evolving*, S.F. CHRON., July 4, 2004, at E1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/07/04/INGKA7BHJ9116.DTL>. DSL requires that sentences rendered by courts are confined to minimum or fixed period specified by statute. *Id.*

186. Pomfret, *supra* note 1.

187. "Now, a person driving along Interstate 5 from Mexico to Oregon is never more than an hour from a California prison. Pilots can even navigate by the facilities' locations." *Id.*

188. *Id.*

189. LITTLE HOOVER COMMISSION, *supra* note 11, at 2.

190. *Id.*

191. Pomfret, *supra* note 1.

192. CAL. DEP'T OF CORR. & REHAB., STRATEGIC PLAN: 2007-2012, 3 (2007), available at [http://www.cdcr.ca.gov/About\\_CDRC/docs/stratplan.pdf](http://www.cdcr.ca.gov/About_CDRC/docs/stratplan.pdf).

193. James Sterngold & Mark Martin, *Packed Prisons, Elusive Reform: State's Inmate Population Soars as Governor's Promised Overhaul of Parole System Fails to Materialize*, S.F. CHRON., Jan. 27, 2006, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/01/27/MNGBEGUHCHI.DTL>.

194. *Id.*

Together, Schwarzenegger and Hickman also created a new parole program intended to cut an estimated 15,000 individuals from the prison population by expanding alternatives to prison for parole violators.<sup>195</sup> These alternatives, which targeted low-level offenders, included jail time, substance abuse treatment, and more localized treatment and punishment.<sup>196</sup> The program, which lasted from 2004 to 2006, was projected to cost \$150 million.<sup>197</sup> Optimistically, assuming that fewer officers would be needed under this program, the CDCR closed the correctional officer training academy.<sup>198</sup>

In 2005, the CDCR developed a strategic plan to “provide offender risk and needs assessment at the time of initial incarceration and at designated time periods,” by January 2006.<sup>199</sup> This plan proposed to use a COMPAS North Point risk assessment tool to match inmates with specific needs to remedial programs.<sup>200</sup> CDCR claimed that through this program, “[i]nformation developed through structured risk and needs assessments allows correctional administrators to distinguish among offenders who present real risks to public safety and those who do not and to target resources effectively. These assessments could then help prison administrators strategically allocate available education, job training, treatment and pre-release opportunities.”<sup>201</sup>

There is conflicting evidence regarding whether the COMPAS North Point risk assessment tool was used consistently throughout California and whether any real reform was accomplished. By September 2005, the Deputy Director of the parole division stated that the tool had been used on 45,244 offenders.<sup>202</sup> By contrast, in October 2006, the CDCR told the Little Hoover Commission that the tool had been implemented in March 2006 and that 16,916 inmates had been assessed between March and August 2006.<sup>203</sup> Strikingly, however, when asked at a roundtable meeting on police reform in November 2006, a parole agent told the Little Hoover Commission that neither she nor her colleagues had seen any data from parolee risk assessments.<sup>204</sup>

195. Pomfret, *supra* note 1.

196. LITTLE HOOVER COMMISSION, *supra* note 11, at 2.

197. *Id.*

198. *Id.*

199. YOUTH AND ADULT CORR. AGENCY, STRATEGIC PLAN 23 (2005), in GOVERNOR ARNOLD SCHWARZENEGGER, A GOV'T FOR THE PEOPLE FOR A CHANGE: GOVERNOR'S REORGANIZATION PLAN 2: REFORMING CALIFORNIA'S YOUTH AND ADULT CORRECTIONAL SYSTEM (2005), available at <http://www.cpr.ca.gov/pdf/GRP2.pdf>.

200. *Id.*

201. LITTLE HOOVER COMMISSION, *supra* note 11, at 7.

202. Jim L'Etoile, Deputy Director, Division of Adult Parole, Cal. Dep't of Corr. & Rehab., Little Hoover Commission Roundtable Meeting on Parole Reform (Sept. 21, 2005), in LITTLE HOOVER COMMISSION, *supra* note 11, at 7.

203. James E. Tilton, Secretary, California Department of Corrections and Rehabilitation, Written Testimony to the Little Hoover Comm'n (Oct. 26, 2006), in LITTLE HOOVER COMMISSION, *supra* note 11, at 7.

204. LITTLE HOOVER COMMISSION, *supra* note 11, at 7.



### C. CDCR Reform Failures

The COMPAS program was not the only reform that was questionably implemented. There were several areas where CDCR statements regarding attempts at correctional reform were inconsistent or not reflected in action. For example, in 2005, diversion program usage was cut by seventy-six percent, while corrections officials claimed that they were working to expand them.<sup>205</sup> Only a small sampling of inmates on parole benefited from the plan.<sup>206</sup> As noted in the *San Francisco Chronicle*:

[I]n December 2004, 1,816 parolees were undergoing drug treatment in county jails or living at halfway homes providing treatment, two of the parole reforms begun earlier in 2004. By December 2005, only 429 parolees were in the same programs, according to the department's population reports. . . . In many regions, the programs were barely used at all. For example, more than 6,000 parolees in the Central Valley region faced parole revocations for violating conditions of their release; only 18 were in the two types of diversion programs.<sup>207</sup>

In April of 2005, Hickman abruptly abandoned core diversion programs, claiming they would not work, though he also admitted they had never been fully implemented.<sup>208</sup> The rejected reforms included community-based drug treatment programs, electronic monitoring, and halfway houses for parolees, which critics had long claimed were all “possibly dangerous alternatives to reincarceration,” because they remained substantially untested.<sup>209</sup> In reply to questions regarding the possible threat to public safety, Hickman responded: “I don’t know that it was and I don’t know that it wasn’t . . . . We just want to make sure than any program we roll out increases public safety.”<sup>210</sup>

Governor Schwarzenegger also created a Corrections Independent Review Panel (IRP), headed by former Governor Deukmejian, designed to analyze the correctional system and make recommendations for change, which has been more successful than efforts in previous years.<sup>211</sup> In June 2004, the IRP published 239 recommendations which were then submitted as a plan to the Little Hoover Commission to reorganize the CDCR.<sup>212</sup> The CDCR agreed to most of the plan and suggested that the Legislature allow the plan to go forward with some minor adjustments.<sup>213</sup>

205. Sterngold & Martin, *supra* note 193.

206. *Id.*

207. *Id.*

208. *Id.*

209. Andy Furillo, *Governor Calls off New Parole Plan, Returns to Sending Violators to Prison*, SACRAMENTO BEE, April 12, 2005, at A1, available at [http://www.signonsandiego.com/uniontrib/20050412/news\\_1n12prisons.html](http://www.signonsandiego.com/uniontrib/20050412/news_1n12prisons.html).

210. *Id.*

211. LITTLE HOOVER COMMISSION, *supra* note 11, at 2-3.

212. *Id.* at 3.

213. *Id.*

Ultimately, however, poor planning and execution, as well as animus from the prison officers union and victims groups, prevented the implementation of the intended reform. Crime Victims United, a group funded by the CCPOA, also contributed to the unpopularity of the plan, especially through the airing of ads that claimed that the parole reform “kept murders, rapists, and child molesters on our streets.”<sup>214</sup>

In a 2006 interview, Hickman conceded, “[CDCR] really didn’t do a very good job on implementation.”<sup>215</sup> Both he and former Secretary Jeanne Woodward, who also experienced difficulties in implementing reform, spent very little time in office.<sup>216</sup> When Woodward was asked by a federal judge about both of their abrupt resignations, Woodward claimed that election-year politics hindered their ability to address the crisis properly, especially because the administration was already under attack by several interest groups, including teachers, nurses, and firefighters, during Schwarzenegger’s “Year of Reform” in 2005.<sup>217</sup> Hickman commented, “Corrections is still years away from sustainable change. . . . The environment needed to truly reform corrections is still overly influenced by special interests wedded to the status quo.”<sup>218</sup> Hickman and Woodward’s departures also undercut the ability of the department to instigate lasting reform.<sup>219</sup>

Additionally, some, like Dr. Reginald Wilkinson, former Director of the Ohio Department of Rehabilitation and Correction, have claimed: “Stability alone isn’t enough. Support especially from the Governor’s office and the Legislature, must be provided. The best managers and leaders will ultimately fail without assistance from policy-makers.”<sup>220</sup> Finally, there were others who contended that reforms were ineffective because of poor communication between corrections managers and staff members on the front line.<sup>221</sup>

### *D. Reforms Going Forward*

Whatever the reason for these failings, when James Tilton took over the role of Secretary of CDCR in 2006, he came with knowledge that compliance

214. *Id.*

215. Pomfret, *supra* note 1.

216. LITTLE HOOVER COMMISSION, *supra* note 11, at 2-3. Hickman’s successor as CDCR Secretary, James E. Tilton, announced his plans to retire from state service after more than two years as Secretary on April, 15, 2008. See Press Release, Cal. Dep’t of Corr. & Rehab., CDCR Secretary James E. Tilton Announces Retirement (Apr. 15, 2008), *available at* [http://www.cdcr.ca.gov/News/2008\\_Press\\_Releases/April\\_15.html](http://www.cdcr.ca.gov/News/2008_Press_Releases/April_15.html). Matthew Cate has been appointed as his replacement. CDCR.ca.gov, CDCR News, April 2008, [http://www.cdcr.ca.gov/About\\_CDCR/Staff\\_News/sn2008April.pdf](http://www.cdcr.ca.gov/About_CDCR/Staff_News/sn2008April.pdf).

217. *Id.*

218. Roderick Q. Hickman, former Secretary, Cal. Dep’t of Corr. & Rehab., Testimony to the Little Hoover Comm’n (Oct. 26, 2006), in LITTLE HOOVER COMMISSION, *supra* note 11, at 2.

219. LITTLE HOOVER COMMISSION, *supra* note 11, at 5.

220. Wilkinson Testimony, *supra* note 116, at 5.

221. LITTLE HOOVER COMMISSION, *supra* note 11, at 8.

with United States District Judge Thelton Henderson's reform orders would require a great deal of effort. Judge Henderson made it clear that the CDCR required a good deal of reform in order to overcome the "trained incapacity" he found to exist in the department prior to the establishment of the medical receivership in 2005 in *Plata*.<sup>222</sup> Robert Sillen, the receiver, agreed in his July 2006 report to the court that "trained incapacity" remains a major cultural barrier to the implementation of reform.<sup>223</sup>

### *Reform Budgeting*

The Governor's 2007 budget included an additional \$5 million from the General Fund to continue implementation of the Valdivia Remedial Plan, used primarily for parolee correctional case records services and attorney services.<sup>224</sup> Under the plan, the parole revocation hearing system is required to provide fair and prompt disposition of each action and ensure that counsel will be appointed for all alleged parole violators.<sup>225</sup>

In addition, the Governor proposed a California Sentencing Commission to review and make recommendations regarding sentencing guidelines and parole policies.<sup>226</sup> The Commission is intended to act as an information clearinghouse for sentencing and is required to give the Legislature recommendations on sentencing guidelines each year.<sup>227</sup> The Governor's budget in 2007 included \$457,000 for the Commission, however the Commission has yet to be established.<sup>228</sup>

The Governor's office hopes to benefit from savings resulting from changes to the parole structure, allowing law enforcement to focus their efforts on people who pose the greatest risk of recidivism. The Governor has proposed the elimination of parole for some low level offenders and automatic discharge

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222. "Henderson coined the phrase 'trained incapacity' to describe what he called the 'can't do' attitude of corrections staff toward implementing reforms." *Id.* at 6. "The original phrase, 'trained incapacity,' comes from the economist Thorstein Veblen, who used it to refer, among other things, to the inability of those with engineering or sociology training to understand certain issues which they would have been able to understand if they had not had this training." Herman Kahn, *The Expert and Educated Incapacity*, HUDSON INSTITUTE (1990) (excerpt from HERMAN KAHN, *WORLD ECONOMIC DEVELOPMENT: 1979 AND BEYOND* 482-84 (Westview Press 1979)), available at [http://www.hudson.org/index.cfm?fuseaction=publication\\_details&id=2219](http://www.hudson.org/index.cfm?fuseaction=publication_details&id=2219).

223. Sillen Testimony, *supra* note 120, at 6; *see also* Sillen, *supra* note 25.

224. CORRECTIONS AND REHABILITATION 2007-08, *supra* note 120, at 3.

225. SENATE COMMITTEE ON PUBLIC SAFETY, PAROLE: CODIFICATION OF THE VALDIVIA COMPLIANCE REMEDIAL PLAN, 2003-04 Reg. Sess., (Cal. 2004), available at [http://leginfo.ca.gov/pub/03-04/bill/sen/sb\\_1601-1650/sb\\_1640\\_cfa\\_20040419\\_155209\\_sen\\_comm.html](http://leginfo.ca.gov/pub/03-04/bill/sen/sb_1601-1650/sb_1640_cfa_20040419_155209_sen_comm.html); S.B. 1640, 2003-04 Leg., Reg. Sess. (Cal. 2004) (unenacted) (Apr. 12, 2004 amended version), available at [http://leginfo.ca.gov/pub/03-04/bill/sen/sb\\_1601-1650/sb\\_1640\\_bill\\_20040412\\_amended\\_sen.pdf](http://leginfo.ca.gov/pub/03-04/bill/sen/sb_1601-1650/sb_1640_bill_20040412_amended_sen.pdf).

226. BUDGET 2007-08, *supra* note 119, at 3.

227. *Id.*

228. *Id.*

from parole for those people who have twelve months of “clean time.”<sup>229</sup> The CDCR also plans to eliminate the typical ninety-day diagnostic evaluations.<sup>230</sup> In total, the Governor’s office estimated these changes would result in savings of \$56.7 million in 2007-08 and \$75.5 million in 2008-09.<sup>231</sup> To accomplish this, the administration is proposing trailer bill language to implement the clean time discharge and evaluation elimination. The plans toward elimination of parole for low level violators would be constructed based on recommendations made by a sentencing commission envisioned by Schwarzenegger.<sup>232</sup>

It remains to be seen, however, whether the legislature will implement these proposals (as it has already rejected some) or whether new CDCR Secretary Matthew Cate will be able to reform the parole system where his predecessors failed. In the meantime, much work will be required in order to ensure the functionality of parole and rehabilitative structures at the level of functioning prior to Hickman’s taking office.

#### CONCLUSION

The future growth and improvement of California corrections policy and function will be tested in the years ahead. It will likely be at least a decade before California prison populations and medical care are under control.<sup>233</sup> Additionally, restructuring of the parole and rehabilitative functions of CDCR will require years to overcome the history of “trained incapacity.”<sup>234</sup> However, lethal injection protocol may change very drastically in the near future, requiring the State to reconsider its use of lethal injection and, perhaps, the death penalty generally.

Legislative acts and judicial decisions will certainly guide the way for much of the reform required; however, executive action and departmental responsibility will be required for the implementation. In all likelihood, California’s prison, rehabilitative, and sentencing systems will be quite different from those under former Governor Davis, and even the current system, as these reforms are carried out over the coming decade. What remains unclear, however, is how much money and energy the State will be willing to spend on such reforms in order to transform these idealized practices into reality.

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229. *Id.*

230. *Id.*

231. BUDGET 2007-08, *supra* note 119, at 3.

232. SENATE COMM. ON BUDGET AND FISCAL REVIEW, OVERVIEW OF THE 2007-08 BUDGET BILL: CORRECTIONS AND REHABILITATION (2007), available at <http://www.sen.ca.gov/budget/OVER07/Corrections.pdf>.

233. Cprinc.org, *supra* note 110.

234. *Id.* HeinOnline -- 13 Berkeley J. Crim. L. 144 2008