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## MASS INCARCERATION: WHY ARE SOLUTIONS SO DIFFICULT IN CALIFORNIA?

Michael Vitiello\*

### I. AN OVERVIEW

After decades of increased use of incarceration, enhanced sentences, and mandatory minimum sentences, the United States is shifting direction in short order.<sup>1</sup> As observed by Professors Joan Petersilia and Francis Cullen, we have reached the “tipping point” towards a new way of thinking about incarceration: “For so long, mass incarceration had been the governing policy of corrections. . . . [S]eemingly overnight, its hegemony was shattered, and *downsizing* quickly emerged as its replacement.”<sup>2</sup>

Indeed, one does not have to look far to see new reports about the change in philosophy from tough-on-crime to smart-on-crime. When I have lectured or written about reforming criminal sentencing, I urge conservatives to examine the website [rightoncrime.com](http://rightoncrime.com).<sup>3</sup> There, they can find proposals advanced by dyed-in-the-wool conservatives like Newt Gingrich and Grover Norquist that largely parallel proposals that liberals have been advancing for years.<sup>4</sup> Presidential candidates have promised to make sentencing reform a campaign issue in the 2016 presidential election. Pressure is on candidates like Hillary Clinton to adopt a reformist agenda.<sup>5</sup> Clinton is joined by her potential Republican opponents in calling for significant reform to the criminal justice system.<sup>6</sup> Articles now routinely appear in national

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

<sup>2</sup> *Id.* at 6–7.

<sup>3</sup> See, e.g., Michael Vitiello, *Reforming California Sentencing Practice and Policy: Are We There Yet?* 46 McGeorge L. Rev. 685, 690 (2014).

<sup>4</sup> See generally RIGHTONCRIME.COM, <http://www.rightoncrime.com/the-conservative-case-for-reform/statement-ofprinciples/> (last visited June 22, 2015).

<sup>5</sup> Alex Seitz-Wald, *Hillary Clinton Calls for Ending ‘Era of Mass Incarceration’*, MSNBC (April 29, 2015, 10:43 AM), <http://www.msnbc.com/msnbc/hillary-clinton-calls-ending-era-mass-incarceration>.

<sup>6</sup> See Peter Baker, *2016 Candidates Are United in Call to Alter Justice System*, N.Y. TIMES (Apr. 27, 2015), <http://www.nytimes.com/2015/04/28/us/politics/being-less-tough-on-crime-is-2016-consensus.html>.

media outlets that reflect the change in attitude nationwide.<sup>7</sup> For example, as a I begin writing this essay, one could read stories about Rand Paul's discussions of crime and punishment; a report about to be published in New York advocating for shorter sentences, broader availability of probation and alternatives to incarceration for a third of convicted felons; and the startling news that Nebraska has voted to abandon the death penalty.<sup>8</sup>

Nationwide, the total prison population in state prisons is declining.<sup>9</sup> As reported by the Sentencing Project, California, New York, and New Jersey have led the decline in prison population.<sup>10</sup> Not only did New York and New Jersey reduce prison populations by about 25%, but also those states have not experienced increases in crime rates. There, crime rates have declined more rapidly than elsewhere: "Between 1999-2012, New York and New Jersey's violent crime rate fell by 31% and 30%, while the national rate decreased by 26%."<sup>11</sup> Those states experienced similar declines in property crimes, also resulting in crime rates below the national average.<sup>12</sup> A Pew Charitable Trusts' report found that states are not only reducing prison populations but several have closed prisons.<sup>13</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., Bill Ruthhart, *Rand Paul in Chicago: Crime 'Not a Racial Thing, it is a Spiritual Problem'*, CHI. TRIB. (May 28, 2015), <http://www.chicagotribune.com/news/local/politics/ct-rand-paul-chicago-visit-met-0528-20150527-story.html#page=1>; Beth Schwartzapfel, *Shorter Sentences, Shrinking Prisons*, THE MARSHALL PROJECT (May 26, 2015), <https://www.themarshallproject.org/2015/05/26/shorter-sentences-shrinking-prisons>; Joanne Young, *Nebraska's Death Penalty is Repealed*, LINCOLN J. STAR (May 28, 2015), [http://journalstar.com/legislature/nebraska-s-death-penalty-is-repealed/article\\_e2ee72ab-cfe2-548c-b0f7-8a3ccf3b05fa.html](http://journalstar.com/legislature/nebraska-s-death-penalty-is-repealed/article_e2ee72ab-cfe2-548c-b0f7-8a3ccf3b05fa.html).

<sup>9</sup> Marc Mauer & Nazgol Ghandoosh, *Fewer Prisoners, Less Crime: A Tale of Three States*, THE SENTENCING PROJECT 1, 2 (July 2014), available at [http://sentencingproject.org/doc/publications/inc\\_Fewer\\_Prisoners\\_Less\\_Crime.pdf](http://sentencingproject.org/doc/publications/inc_Fewer_Prisoners_Less_Crime.pdf).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 1.

<sup>12</sup> *Id.*

<sup>13</sup> Nicole D. Porter, *On the Chopping Block 2013: State Prison Closures*, THE SENTENCING PROJECT 1 (2013), available at [http://sentencingproject.org/doc/publications/inc\\_On%20the%20Chopping%20Block%202013.pdf](http://sentencingproject.org/doc/publications/inc_On%20the%20Chopping%20Block%202013.pdf); see also Press Release, Pew Charitable Trusts, *U.S. Prison Count Continues to Drop: More Than Half the States Cut Imprisonment Rates from 2009-2013* (Mar. 14, 2013), <http://www.pewtrusts.org/en/about/news-room/press->

Despite California's success in reducing its prison population, California is not a success story. Its reduction in its prison population would not have been possible without the persistence of a panel of three federal judges who found that the state's prison health care and mental health systems were so inadequate that the state was violating the prisoners' Eighth Amendment rights to be free from cruel and unusual conditions of confinement.<sup>14</sup> When Governor Brown and the Democratic legislature saw that the Supreme Court was likely to affirm the panel's order to reduce the state's prison, the legislature adopted the governor's Realignment bill without a single Republican vote.<sup>15</sup> The law did not result in the release of anyone then serving time in prison. Instead, most non-violent and low-level felons have become the responsibility of the counties.<sup>16</sup> The law has lowered the prison population by attrition as felons are released from prison and fewer offenders are now sent to prisons.<sup>17</sup> Counties now handle drug and property crimes, which represents over half of all felony convictions in a given year.<sup>18</sup>

Despite the governor's claim that Realignment was a bold step, the law's long-term effects are uncertain. As I have written elsewhere:

Some observers herald the shift of responsibility to local governments. And Realignment certainly did shift responsibility away from Sacramento. Thus, each county must create a community corrections partnership, involving the various "stakeholders." The panel must create a plan to implement the law. The

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releases/2014/03/14/us-imprisonment-rate-continues-to-drop-amid-falling-crime-rates.

<sup>14</sup> *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 949 (2009); Vitiello, *supra* note 3, at 696.

<sup>15</sup> See Assembly Floor Vote on AB 109, 2011-2012 Sess. (Cal. 2011), available at [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_0101\\_0150/ab\\_109\\_vote\\_20110317\\_0532PM\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0101_0150/ab_109_vote_20110317_0532PM_asm_floor.html); Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, 8 HARV. J.L. & PUB. POL'Y 327, 332(2014).

<sup>16</sup> CAL. PENAL CODE § 17.5 (West 2013); Petersilia, *supra* note 15, at 332 ("Felons convicted of certain serious, violent, and aggravated sex offenses continue to serve their time in state prison, but sentences for more than five hundred other felony crimes must be served through county jail time or probation.").

<sup>17</sup> *Id.* at 333.

<sup>18</sup> *Id.*

state has promised funds to the counties, but, consistent with the preference for local control, counties are largely free to spend the funds as the local government sees fit. That may mean spending funds on alternatives to incarceration or it may mean using the funds for expanding local jails. Not surprising given the diverse political climates around the state, counties are spending Realignment funding in widely different ways.

Whether Realignment can deliver over the long term is less certain. No doubt, incarceration in county jails is less expensive than in state prisons. But depending on how high-incarceration counties respond, the net effect of Realignment may be moving prisoners from state to local facilities without achieving the grander goal of reducing recidivism. Indeed, while some reports point to the decline in California's prison population, the total number of offenders in some form of incarceration has not dropped nearly as sharply, given the increased populations in county jails and given the number of prisoners that California has shipped out of state, to reduce cost and population in its state prisons. Realignment is simply a shell game if it merely moves prisoners elsewhere.<sup>19</sup>

The federal judges in charge of the prison health system doubt that Realignment is a long-term solution and have indicated that California should look for a more permanent solution to its prison-overcrowding problem.<sup>20</sup>

Outside of California, sentencing commissions are no longer particularly controversial. The federal sentencing guidelines have generated a good deal of criticism.<sup>21</sup> But many states have adopted

<sup>19</sup> Vitiello, *supra* note 3, at 702–03; *see generally* Petersilia & Cullen *supra*, note 1.

<sup>20</sup> *See* Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013 Deadline at 2, *Coleman v. Brown*, No. 2:90-cv-0520 LKK DAD (PC) (E.D. Cal. Feb. 10, 2014), *available at* <http://www.cdcr.ca.gov/News/docs/3jp-Feb-2014/Three-Judge-Court-opinion-2-20-2014.pdf>.

<sup>21</sup> *See, e.g.*, Sari Horwitz, *Some Prosecutors Fighting Effort to Eliminate Mandatory Minimum Prison Sentences*, WASH. POST (June 22, 2015),

sentencing commissions and guidelines with positive results. Many states have limited the cost of their prison systems without endangering public safety.<sup>22</sup> Indeed, the experience with sentencing commissions in many states has led a committee of the American Law Institute to recommend a model sentencing commission and guideline system to replace the sentencing provisions of the Model Penal Code.<sup>23</sup>

And yet California has repeatedly rejected resorting to a sentencing commission and to other programs to reduce prison population, like early release for older felons, which have worked elsewhere.<sup>24</sup> Thus, while states elsewhere, including deep Red states, are adopting proven alternatives to incarceration, California lags behind.<sup>25</sup>

Commentators, including me, have written about why California has been slow to join the national trend.<sup>26</sup> Rather than simply repeating those arguments, this essay introduces readers to the personae dramatis through a series of fictionalized biographies of leading California politicians to animate the unique political environment that is the California state of mind. I have fictionalized those characters because I want to protect the not-so-innocent and because term limits result in an all too rapid change in the decision

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[http://www.washingtonpost.com/world/national-security/some-prosecutors-fighting-effort-to-eliminate-mandatory-minimum-prison-sentences/2014/03/13/f5426fc2-a60f-11e3-a5fa-55f0c77bf39c\\_story.html](http://www.washingtonpost.com/world/national-security/some-prosecutors-fighting-effort-to-eliminate-mandatory-minimum-prison-sentences/2014/03/13/f5426fc2-a60f-11e3-a5fa-55f0c77bf39c_story.html).

<sup>22</sup> See generally Mauer & Ghandooosh, *supra* note 9, at 2–3.

<sup>23</sup> Model Penal Code: Sentencing § 6.A.01 (Am. Law Inst., Tentative Draft 2014), available at <http://www.robinainstitute.org/wp-content/uploads/MPC-Tentative-Draft-No.-3-Final.pdf>.

<sup>24</sup> Amanda Lopez, *Coleman/Plata: Highlighting the Need to Establish an Independent Corrections Commission in California*, 15 BERKELEY J. CRIM. L. 97, 114 (2010); see also Michael Vitiello & Clark Kelso, *A Proposal for a Wholesale Reform of California's Sentencing Practice and Policy*, 38 LOY. L.A. L. REV. 903, 943 (2004).

<sup>25</sup> Vitiello, *supra* note 3, at 706.

<sup>26</sup> See, e.g., Vitiello, *supra* note 3, at 707; Michael Vitiello, *Alternatives to Incarceration: Why is California Lagging Behind?*, 28 GA. ST. U. L. REV. 1275, 1310-1311 (2012); W. David Ball, *Redesigning Sentencing*, 46 MCGEORGE L. REV. 817, 819 (2014).

makers; but their successors seemingly will follow in adopting similar policies.<sup>27</sup> But any similarity to real political actors is intentional.

## II. THE PERSONAE DRAMATIS

### A. *Sam Gruff, Senate Republican Leader*

The 41<sup>th</sup> Senate District<sup>28</sup> encompasses stretches of Los Angeles, Orange, and San Bernardino Counties. The California Citizens Redistricting Commission attempted to realign the 41<sup>st</sup> district to make it more competitive. Since redistricting, the 41<sup>st</sup> district has swung back and forth between Democratic and Republican candidates for local and national offices. For example, in the 2012 Presidential election, the district leaned slightly towards Mitt Romney, by less than 1%. It backed Senator Diane Feinstein by a solid majority.<sup>29</sup> It also reelected Senator Sam Gruff by a large majority. Unlike many California Republicans, Gruff campaigned on his ability to get things done in Sacramento, which required him to point to his reputation of working across the aisle.<sup>30</sup>

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<sup>27</sup> As I have argued elsewhere, limiting legislators' time of service has made sentencing reform more difficult as have other factors, like the influence of organizations like the California District Attorneys Association and the California Correctional Peace Officers Association. Vitiello, *supra* note 3, at 720-725; Michael Vitiello, *Alternatives to Incarceration: Why is California Lagging Behind?*, 28 Ga. St. U. L. Rev. 1275, 1306 (2012).

<sup>28</sup> California has 40 Senate Districts. In keeping with fictionalizing the political actors, I have created a fictional district. Also, as indicated, while Sam Gruff bears some similarities with Republican Senate Leader Bob Huff, Sam Gruff is not Bob Huff. Instead, his character is based on several Republican leaders.

<sup>29</sup> Some observers may be surprised that districts within California in fact do swing back and forth between Democratic and Republican candidates. They may be surprised because so many districts are so blue or red that candidates from the opposing party have virtually no chance of getting elected. For example, the 29<sup>th</sup> Senate District favored Romney over Obama by a narrow margin while backing Feinstein by a substantial majority. *California's 29th State Senate District*, WIKIPEDIA, [https://en.wikipedia.org/wiki/California's\\_29th\\_State\\_Senate\\_district](https://en.wikipedia.org/wiki/California's_29th_State_Senate_district) (last visited July 1, 2015).

<sup>30</sup> Indeed, there are some politicians in California, even in the Republican Party, that tout their ability to work across the aisle. See, e.g., Patrick McGreevy, State Sen. Bob Huff elected new GOP leader, L.A. TIMES (Jan. 4, 2012), <http://latimesblogs.latimes.com/california-politics/2012/01/state-senator-bob-huff-new-gop-leader.html>. Sadly, the promise of cooperation may be made more often than acted on.

Gruff is proud of that reputation. When elected as Senate Republican leader, he stated, "The governor has indicated that he will work with Republicans when possible, and Senate Republicans are open to the compromise and crafting true, bipartisan solutions"—particularly in regard to the budget.<sup>31</sup> Gruff has stated, "My reputation in Sacramento has been one of working across party lines to get things done."<sup>32</sup> Indeed, his willingness to work cooperatively seems to be genuine. Others in the Senate seem to agree with Gruff's self-assessment. Jim Brut, former Senate Republican Leader and current chair of the California Republican Party, characterizes Gruff as a "professional" who has done a "great job."<sup>33</sup> Brut also stated, "Sam is very bright, he's even tempered—you know—he weighs all sides of the argument before he makes a decision. And, I enjoy working with him a lot."<sup>34</sup> Darren Stein, termed-out Senate President pro Tempore, said that Gruff is committed and "a good man."<sup>35</sup> Stein also stated while still in the Senate, "We think together about the issue and we disagree on many things, but we have a common commitment to the state Senate remain a great and effective body."<sup>36</sup>

Gruff would seem like an ideal candidate to seek consensus on adopting wholesale sentencing reform. Most Californians have rejected the idea that California can continue responding to prison overcrowding by building more prisons.<sup>37</sup> Fiscal conservatives have begun to recognize that beyond a certain point, the prisons are poor investments: there is a tipping point where money spent elsewhere yields greater returns than does spending those funds on prisons.<sup>38</sup>

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<sup>31</sup> As indicated, Gruff is modeled only in part on Huff. *Cf. id.*

<sup>32</sup> *Cf. Joe Taglieri, Huff Talks Political Origins, Priorities if Elected Supervisor, Pasadena Independent (Apr. 22, 2015),* <http://www.arcadiaweekly.com/news/huff-talks-political-origins-priorities-if-elected-supervisor/>.

<sup>33</sup> *Cf. Jessi Lau, Senate GOP Leader Bob Huff Reaches Out, CAPITOL WEEKLY (Aug. 14, 2013),* <http://capitolweekly.net/senate-gop-leader-bob-huff-reaches/>.

<sup>34</sup> *Cf. id.*

<sup>35</sup> *Cf. id.*

<sup>36</sup> *Cf. id.*

<sup>37</sup> *See, e.g., Jack Dolan, Californians Would Rather Ease Penalties Than Pay More for Prisons, L.A. TIMES (July 21, 2011),* <http://www.articles.latimes.com/2011/jul/21/local/la-me-poll-prisons-20110721>.

<sup>38</sup> *See Shane Bauer, How Conservatives Learned to Love Prison Reform, MOTHER JONES (Mar./Apr. 2014),*

Despite that, Gruff, along with all of his fellow Republicans, voted against Governor Jerry Green's Realignment legislation, the governor's response to the three-judge panel's order to reduce the state's prison population to 137.5% of capacity.<sup>39</sup>

In light of the change in the political climate elsewhere, Gruff's position may be surprising. And yet, a journalist published a story about a conversation that she overheard between Gruff and Newt Gingrich.<sup>40</sup> The meeting between Gruff and Newt Gingrich took place when Gingrich was in California to speak at various Republican fundraisers and to urge California voters to vote for Proposition 47, which re-characterized several felonies as misdemeanors.<sup>41</sup> When Gingrich met Gruff, he urged him to become a member of Right on Crime. Gruff hesitated and told Gingrich that in California, the sharp downturn in crime was the result of the incarceration of criminals. Gingrich pointed to other explanations and argued that the national movement among conservatives is from tough-on-crime to smart-on-crime.<sup>42</sup> Gruff was unconvinced.<sup>43</sup>

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<http://www.motherjones.com/politics/2014/02/conservatives-prison-reform-right-on-crime>.

<sup>39</sup> Again, Governor Green only partially resembles Governor Brown. Nonetheless, Governor Green's Realignment legislation and the reasons for his support for that law are quite similar to Governor Brown's.

<sup>40</sup> This conversation is entirely fictitious. But Newt Gingrich has parted company with many California Republicans on crime and punishment positions. See e.g., Newt Gingrich & B. Wayne Hughes Jr., *What California Can Learn from the Red States on Crime and Punishment*, L.A. TIMES (Sept. 16, 2014), <http://www.latimes.com/opinion/op-ed/la-oe-0917-gingrich-prop--47-criminal-justice-20140917-story.html>.

<sup>41</sup> See, e.g., *id.*; see also, Jane Susskin, *California Republicans Appeal to the Asian Community*, IVN (Feb. 25, 2012), <http://ivn.us/2012/02/25/california-republicans-appeal-to-the-asian-community/>.

<sup>42</sup> See FRANKLIN E. ZIMRING, GORDON HAWKINS, SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 155 (2001).

<sup>43</sup> In a fascinating book, co-authors Carol Tavis and Elliot Aronson explain how cognitive dissonance allows a person not only to ignore facts that contradict a deeply held belief but also being confronted with such facts may strengthen one's original position. See generally CAROL TAVRIS & ELLIOT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS (2007).

Gruff then told Gingrich that Republicans are still beholden to their donors.<sup>44</sup> When Gingrich reminded him that the Koch brothers are supporting sentencing reform nationwide,<sup>45</sup> Gruff said, “Newt, you have not met the ‘Rhino-in-the-room,’ the California Correctional Police Officers Association [CCPOA].” The union and victims’ rights groups still favor prison construction rather than sentencing reform.<sup>46</sup> He was quick to point out that the union had not given him a huge contribution and still gave more to Democrats than to Republicans; but money is money.<sup>47</sup> Gingrich pointed out that the current union leadership has softened its stand on reform.<sup>48</sup> Gruff countered: “My district includes several rural areas where state prisons are the largest employers.”<sup>49</sup>

Finally, according to the reporter, Gruff reminded Gingrich that the Republican Party in California had only recently made clear its opposition to Governor Green’s modest Realignment legislation.<sup>50</sup> Gruff also admitted that he fears his party’s backlash if he urges a U-turn and the party does not follow. He then confided to Gingrich the unusual nature of the political divide in California: most of his colleagues still come from safe Republican districts where a hint of

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<sup>44</sup> This conversation is the product of my imagination. But California’s Republicans are out of step with Republicans elsewhere on this issue. See Garrick Percival, *Prison Realignment: Republicans Ought to Be Leading, Not Opposing This Trend*, SAN JOSE MERCURY NEWS (July 18, 2013, 12:01PM), [http://www.mercurynews.com/ci\\_23680080/prison-realignment-republicans-ought-be-leading-not-opposing](http://www.mercurynews.com/ci_23680080/prison-realignment-republicans-ought-be-leading-not-opposing).

<sup>45</sup> Tim Mak, *Koch Bros to Bankroll Prison Reform*, DAILY BEAST (Jan. 13, 2015), <http://www.thedailybeast.com/articles/2015/01/13/koch-bros-to-bankroll-prison-reform.html>.

<sup>46</sup> CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION, *NEW DIRECTIONS: A BLUE PRINT FOR REFORMING CALIFORNIA’S PRISON SYSTEM TO PROTECT THE PUBLIC, REDUCE COSTS AND REHABILITATE INMATES*, 1, 8-10 (January 2010), available at [http://www.ccpoa.org/files/ccpoablueprint0110\\_1.pdf](http://www.ccpoa.org/files/ccpoablueprint0110_1.pdf) [hereinafter CCPOA]

<sup>47</sup> See generally Nat’l Inst. on Money in State Politics, *Behind the Money* (June 29, 2015), <http://www.followthemoney.org/entity-details?eid=3286>.

<sup>48</sup> See Vitiello *supra* note 3, at 706.

<sup>49</sup> See Tracy Huling, *Building a Prison Economy in Rural America*, PRISONPOLICY.ORG (2002), [http://www.prisonpolicy.org/scans/building.html#\\_edn9](http://www.prisonpolicy.org/scans/building.html#_edn9)

<sup>50</sup> California Crime Watch, *What Is Public Safety Realignment?*, <http://www.arc.asm.ca.gov/cacrimewatch/?p=realignment> (last visited June 30, 2015).

moderation may produce an attack from the right.<sup>51</sup> Agreeing with Democrats has cost some legislators their political seats.<sup>52</sup>

“And let Mikey try it,” quipped Gruff, evoking the old cereal ad where two older boys let the younger Mikey try the new cereal.<sup>53</sup> Translated, Gruff is counting on Democrats to solve the problem of overuse of incarceration and, if something goes wrong, the Republicans will be poised to take advantage of a turn-around in public sentiment.<sup>54</sup>

Just before sending in an op-ed urging Californians to adopt Proposition 47,<sup>55</sup> Gingrich winked at Gruff and says, “I get it.”

#### *B. Tony Mano, Prominent Democratic Senator*

Tony Mano grew up in San Francisco. His parents encouraged him to be a priest. After graduating from Jesuit High School, he entered the seminary to become a priest before realizing that was not the lifestyle that he wanted to pursue.<sup>56</sup>

Mano came of age during the HIV/AIDS crisis during the 1980s. He became active as an advocate for LGBT rights as a result of his experiences with the loss of several of his close friends to AIDS. His activism led to his involvement in politics.

Running on his record as an advocate for LGBT rights, he was elected to the state assembly by a wide margin in one of the most

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<sup>51</sup> See, e.g., Bob Cuddy, *Abel Maldonado, After His Election Loss: ‘I Was Not Raised to Give Up’*, TRIBUNE (Nov. 9, 2012), [www.sanluisobispo.com/2012/11/09/2290489/abel-maldonado-election-interview.html](http://www.sanluisobispo.com/2012/11/09/2290489/abel-maldonado-election-interview.html) (Illustrating how a candidate lost the support of members of his party by voting with the opposing party on a budget issue).

<sup>52</sup> *Id.*

<sup>53</sup> *Little Mikey*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Little\\_Mikey](http://en.wikipedia.org/wiki/Little_Mikey) (last modified Nov. 25, 2014); Panbiscuit, *Life Cereal: Mikey Likes It*, YOUTUBE (Sept. 10, 2006), <https://www.youtube.com/watch?v=vYEXzx-TINc>.

<sup>54</sup> See generally Vitiello, *supra* note 3.

<sup>55</sup> Gingrich & Hughes Jr., *supra* note 40.

<sup>56</sup> Mano and Senator Mark Leno share some similarities. Unlike Mano, Leno is Jewish and was headed towards becoming a rabbi before changing course. See Joe Eskenazi, *Only in S.F.: Gay, Rabbinical School Dropout Deemed Too Conservative*, SF WEEKLY (Oct. 29, 2010), <http://www.sfweekly.com/thesnitch/2010/10/29/only-in-sf-gay-rabbinical-school-dropout-deemed-too-conservative>.

liberal districts in the state.<sup>57</sup> In addition, especially in light of his Jesuit training, social justice has remained a driving principle in Mano's private and public life.

Even before the Supreme Court granted certiorari in *Plata* and *Coleman*,<sup>58</sup> Mano urged prison reform in the Assembly. At one point, he gave a powerful speech pointing to the fact that California could no longer afford to keep building prisons because the state was starving public education and its university system.<sup>59</sup> He was stunned when a Republican colleague accused him of inviting mayhem in the streets.<sup>60</sup> By the time the Court affirmed the three-judge panel's order to reduce the prison population, Mano had argued, in his own words, until he was blue in the face, that the state could find ways to cut prison overcrowding, the state's budget deficit and maintain public safety.<sup>61</sup>

More recently, after being "termed-out" in the Assembly, Mano sought election to the state Senate. In a candidate conversation, Mano explained that he was still interested in sentencing reform but also stated, "Any progress is landmark, and I say that because the politics of the issues we're talking about are so highly charged that legislators are very cautious to support anything that they think could be in any way twisted or misconstrued in their next primary

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<sup>57</sup> See Statewide Database, *California's 2011 State Assembly Districts*, U.C. BERKELEY LAW (2011), [www.statewidedatabase.org/resources/california\\_journal\\_links/assembly2011.html](http://www.statewidedatabase.org/resources/california_journal_links/assembly2011.html) (last visited June 30, 2015) (reporting that California's 9<sup>th</sup> assembly district for 2011 was made up of 45.3% Democrats, 29.8% Republican, and 20.2% no party preference).

<sup>58</sup> *Brown v. Plata*, 131 S. Ct. 1910 (2011); *Coleman v. Schwarzenegger*, 922 F.Supp. 2d 882 (2009).

<sup>59</sup> Marisa Lagos, '*Political Paralysis*' in Calif. Over Prison Reform, SF GATE (June 13, 2011), <http://www.sfgate.com/news/article/Political-paralysis-in-Calif-over-prison-reform-2368491.php>

<sup>60</sup> David Onek, *Episode #6: Mark Leno, Chair, California Senate Public Safety Committee* (The Criminal Justice Conversations Podcast Mar. 16, 2010), [https://www.law.berkeley.edu/files/CrimJusPod\\_Episode\\_6.pdf](https://www.law.berkeley.edu/files/CrimJusPod_Episode_6.pdf)

<sup>61</sup> See Anthony Papa, *Sen. Mark Leno's Bill to Help Curb Prison and Jail Overcrowding*, DRUGPOLICY.ORG (Sept. 5, 2013), <http://www.drugpolicy.org/blog/california-assembly-passes-sen-mark-lenos-bill-help-curb-prison-and-jail-overcrowding>; See also Aaron Sankin, *California Drug Sentencing Reform Could Keep Non-Violent Offenders Out of Prison System*, HUFFINGTON POST (May 2, 2013), [http://www.huffingtonpost.com/2013/05/02/california-drug-sentencing-reform\\_n\\_3204285.html](http://www.huffingtonpost.com/2013/05/02/california-drug-sentencing-reform_n_3204285.html).

election.”<sup>62</sup> In particular, Mano mentioned the fear of being labeled as soft on crime. Mano lamented, “politics [are] infusing our work, and destroying our work, in my opinion” and “so many of our problems in so many issue areas in Sacramento go back to term limits.”<sup>63</sup> And then there were the CCPOA’s small, but real donations to his campaign.<sup>64</sup>

Despite his fears about having his support for reform coming back to bite him, he won his Senate seat. There, he voted for Governor Green’s Realignment legislation. However, when members of a prison reform group approached him about supporting more permanent and sweeping reform legislation, Mano hedged in agreeing to support their agenda. “Now is not the time. We just put in place bold legislation. Let’s see whether it works.”<sup>65</sup>

Members of the prison reform group were sorely disappointed. After they left Mano’s office, they argued among themselves whether Mano’s ambition was getting in the way of his reformist sentiments. “Mano is thinking about Congress. And being soft-on-crime won’t help him with voters in Walnut Creek and San Mateo,” quipped one of his critics.<sup>66</sup>

### C. Pamela Morris, Attorney General

Attorney General Morris is for many a shining model of progressive northern California. A child of mixed race parents, both

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<sup>62</sup> Onek, *supra* note 60.

<sup>63</sup> *Id.*

<sup>64</sup> See generally Nat’l Inst. on Money in State Politics, *supra* note 47.

<sup>65</sup> Sara Gaiser, *SF and LA Legislators Targeted by Prison Reform Advocates*, SAN FRANCISCO APPEAL (Feb 19, 2014), <http://sfappeal.com/2014/02/sf-and-la-legislators-targeted-by-prison-reform-advocates/>.

<sup>66</sup> See Vitiello, *supra* note 27, at 1285; see also Phillip Reese, *California’s Most Conservative and Liberal Cities; Where’s Yours?*, SACRAMENTO BEE (Aug. 17, 2014), available at <http://www.sacbee.com/site-services/databases/article2606981.html> (illustrating that while liberal voters outnumber conservative voters in Walnut Creek and San Mateo, the ratio of liberal voters is higher in San Francisco; San Francisco liberal voters: 251,945 conservative voters: 47,000, Walnut Creek liberal voters: 18,764 conservative voters: 13,349, San Mateo liberal voters: 24,758 conservative voters: 10,757).

prominent academics, she received an outstanding education in Berkeley, where she grew up.<sup>67</sup>

Although her parents were active in the Civil Rights movement, Morris demonstrated a good bit of political acumen even in her early career. She secured a position in the Alameda County District Attorney's Office early in her career out of recognition that many successful politicians in California as elsewhere have started as prosecutors. After establishing her credentials, she ran for the position as District Attorney. She won in large part because she understood how to build a bipartisan alliance. Even before conservatives adopted the smart on crime approach, she approached conservative community groups and convinced them to back many of her progressive initiatives.<sup>68</sup> Convincing conservative groups to back the use of alternative sentences for low-level drug offenders presaged her general approach to politics.<sup>69</sup>

During her career as a prosecutor, she has demonstrated that a reformer can succeed. She pursued her goal of reducing recidivism by expanding community courts; cracking down on truancy; treating young prostitutes as victims, not as criminals; and offering young drug offenders job training instead of a one way ticket to jail.<sup>70</sup> As one prominent politician has said of Morris, "She can't just talk a good game. She has to really prove to those who doubted her that she means what she says and is fully committed to public safety."<sup>71</sup> She has lectured extensively on getting smart on crime. In doing so, she has emphasized the economics of sentencing reform rather than focusing on the human cost to those caught up in the system.<sup>72</sup> Folks close to her suggest that the emphasis is calculated.<sup>73</sup>

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<sup>67</sup> As with the other characters in this fictional account of California politics, Pamela Morris does resemble an existing politician. Obviously, Attorney General and probable U.S. Senator Kamala Harris inspired Morris.

<sup>68</sup> Sasha Abramsky, *Kamala Harris, Protecting and Serving the 99 Percent*, THE NATION (July 23, 2012) <http://www.thenation.com/article/169021/kamala-harris-protecting-and-serving-99-percent#> (last visited June 22, 2015).

<sup>69</sup> *Id.* at 7.

<sup>70</sup> *Id.* at 8.

<sup>71</sup> *Id.* at 9.

<sup>72</sup> *Id.* at 8.

<sup>73</sup> See Maura Dolan, *No Rush to Judgment for Atty. Gen. Kamala D. Harris*, L.A. TIMES, (Nov. 1, 2014, 5:00 AM), available at

The extent to which Morris balances her true beliefs against political necessity was reflected in first election to the position of Attorney General. Her moderate Republican opponent was a long-time opponent of Three Strikes.<sup>74</sup> While Morris agreed with her opponent's belief that Three Strikes went too far, she tried to outflank her opponent as tough-on-crime. That did not stop critics from accusing of her of being soft-on-crime. It also did not earn her the endorsement of the California District Attorneys Association.<sup>75</sup> Her circumspection may have been justified: she won the election by less than 1%.<sup>76</sup>

In her reelection to the position, she earned support from police organizations that had supported her opponent four years earlier.<sup>77</sup> While her victory was substantial, her earlier narrow victory seems to have played into her risk aversion, according to close associates. One friend spoke off the record and described his friend as tactical, cautious, and reluctant to tackle divisive issues.<sup>78</sup> She largely sat on the sidelines when Governor Green was pushing his Realignment legislation even though her office eventually worked effectively in helping to implement provisions of the law.<sup>79</sup>

Morris's proponents contend that she has been a leader on important issues. She was vocal in support of same sex marriages and

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<http://www.latimes.com/local/california/la-me-pol-kamala-harris-20141101-story.html#page=1>.

<sup>74</sup> *Cooley's Law*, THE ECONOMIST (Jul. 29, 2010), available at

<http://www.economist.com/node/16693779>.

<sup>75</sup> Marie Gottschalk, *Days Without End: Life Sentences and Penal Reform*, PRISON LEGAL NEWS, 1, 14 (2012), available at

<http://www.prisonlegalnews.org/news/2012/jan/15/days-without-end-life-sentences-and-penal-reform/>.

<sup>76</sup> Seema Mehta, *Kamala Harris Hits the Airwaves*, L.A. TIMES (Oct. 15, 2014), available at <http://www.latimes.com/local/political/la-me-pc-harris-airwaves-20141014-story.html>.

<sup>77</sup> Maura Dolan, *No Rush to Judgment for Atty. Gen. Kamala D. Harris*, L.A. TIMES (Nov. 1, 2014, 5:00 AM).

<sup>78</sup> Editorial, *Endorsement for Attorney General, Kamala Harris*, L.A. TIMES (Sept. 23, 2014, 5:47 PM), available at <http://www.latimes.com/opinion/endorsements/la-ed-end-attorney-general-20140924-story.html>.

<sup>79</sup> *Id.*

has used her office to take on unfair lending practices.<sup>80</sup> Her critics say that these are popular positions, not demonstrating any political courage and cite instances like her failure to oppose or back Proposition 47 as evidence of her unwillingness to “rock the boat.”<sup>81</sup> Her donations from the CCPOA are small and probably do not explain her positions on any of the major issues involving law enforcement and incarceration.<sup>82</sup>

Most recently, Morris has announced plans to run for the United States Senate to replace retiring Senator Barbara Boxer. Consistent with her tendency to seek broad bases support, her announcement of her candidacy touted several popular positions: innovative and effective approaches to fighting crime, fighting for middle class families, challenging predatory lending practices, and fighting for consumers.<sup>83</sup> Conspicuously absent from her policy presentation is any mention of sentencing reform at the state or federal level.

When quizzed privately about whether she would back legislation creating a sentencing commission, Morris’s spokesperson said that would depend entirely on the how the commission was configured. And when pressed on whether she would take the lead in advocating for such a bill, her spokesperson insisted that her positions are well-known and that an attorney general and United States Senator is not the person responsible for advancing state prison reform.<sup>84</sup>

#### *D. Governor Green*

Governor Green was headed to the priesthood in the early 1960s when he had an epiphany.<sup>85</sup> He left the seminary and became a

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<sup>80</sup> Dolan, *supra* note 77.

<sup>81</sup> *Id.*

<sup>82</sup> See generally Nat’l Inst. on Money in State Politics, *supra* note 47.

<sup>83</sup> See *supra* note 78 (discussing many of the candidate’s positions).

<sup>84</sup> Cf. Maeve Reston, *With Kamala Harris in for Senate Bid, Tom Steyer Edges Closer to a Run*, CNN (Jan. 13, 2015, 4:57 PM),

<http://www.cnn.com/2015/01/12/politics/kamala-harris-california-senate> (explaining the focus of her campaign with no mention of state sentencing reform); see generally KAMALA D. HARRIS, *SMART ON CRIME* (2009).

<sup>85</sup> No doubt, readers recognize that Governor Jerry Brown has some vague resemblances to Governor Jerry Green.

Buddhist.<sup>86</sup> His political roots run deep in California. His father and sister were both governors. His close personal friends include most of the big names in state politics, including Diane Feinstein, who performed his wedding.<sup>87</sup> He has held almost every conceivable elected office in California, including Attorney General and mayor of Oakland.<sup>88</sup>

Fairly early in his political career, he served in the Assembly and led efforts to abandon indeterminate sentencing. During the signing ceremony for the new law, he stated, “This is the most far-reaching criminal-justice reform in the last fifty years.”<sup>89</sup> Years later, when he was the mayor of Oakland, he lamented that the law was an “abysmal failure.” He called California’s prisons “postgraduate schools of crime.”<sup>90</sup> But as Attorney General and then as Governor, he positioned himself as tough-on-crime.<sup>91</sup> Indeed, as Governor, he consistently flouted the three-judge panel’s orders to reduce the size of the prison population.<sup>92</sup> Indeed, some of his rhetoric sounded quite demagogic.<sup>93</sup> Had it been delivered with a Southern accent, his

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<sup>86</sup> Laura Mandaro, *Jerry Brown Wins Fourth Term as California Governor*, USA TODAY (Nov. 5, 2014, 8:05 AM), available at [www.usatoday.com/story/news/nation-now/2014/11/05/jerry-brown-california-governor/18520473/](http://www.usatoday.com/story/news/nation-now/2014/11/05/jerry-brown-california-governor/18520473/).

<sup>87</sup> Leah Garchik, *Oakland’s Royal Wedding: Nearly 600 Attend Jerry Brown’s Nuptials*, SF GATE (June 19, 2005, 4:00 AM), available at <http://www.sfgate.com/entertainment/garchik/article/Oakland-s-royal-wedding-Nearly-600-attend-Jerry-2627405.php>.

<sup>88</sup> Jessica Levinson, *5 Things You Should Know About the California Election*, HUFFINGTON POST (Nov. 3, 2014, 5:59 AM), [http://www.huffingtonpost.com/jessica-levinson/5-things-you-should-know-\\_6\\_b\\_6091642.html](http://www.huffingtonpost.com/jessica-levinson/5-things-you-should-know-_6_b_6091642.html).

<sup>89</sup> Vauhini Vara, *Will California Again Lead the Way on Prison Reform?*, NEW YORKER (Nov. 7, 2014), available at <http://www.newyorker.com/business/currency/will-california-lead-way-prison-reform>.

<sup>90</sup> *Id.*

<sup>91</sup> Mark Martin, *Jerry Brown: I Was Tough on Crime and I Have the Charts to Prove It*, SF GATE (Feb. 8, 2007, 4:33 PM), <http://blog.sfgate.com/nov05election/2007/02/08/jerry-brown-i-was-tough-on-crime-and-i-have-the-charts-to-prove-it/>.

<sup>92</sup> See Editorial Board, *A Sentencing Commission for California*, N.Y. TIMES (Mar. 9, 2014), available at [http://www.nytimes.com/2014/03/10/opinion/a-sentencing-commission-for-california.html?\\_r=0](http://www.nytimes.com/2014/03/10/opinion/a-sentencing-commission-for-california.html?_r=0).

<sup>93</sup> See generally, e.g., Jerry Brown, Governor of California, Inaugural Remarks at Swearing-in Ceremony (Jan. 3, 2011), available at <http://gov.ca.gov/news.php?id=16866>; see also Vara, *supra* note 89.

statements might have sounded like something out of the mouth of a Southern governor in the 1960s, resisting federal intervention. His hardline stand on the prison population made him quite popular with CCPOA, which has given him large donations in recent years.<sup>94</sup>

Five years ago, under continued pressure from the three-judge panel, Green gathered his advisors for a strategy session. The Supreme Court argument made him nervous. One of his advisors told him that the Court was going to split 5-4 and that Justice Kennedy would be the “swing vote.”<sup>95</sup> In response to Green’s question about how Kennedy would vote, his advisor was willing to bet his house on Kennedy voting to affirm the three-judge panel’s order. Other advisors agreed.

With that assessment, Green asked his advisors to prepare legislation that would do as little as necessary to comply with the judges’ order. He did not want to order the release of a lot of dangerous felons into the general population. He had seen how quickly popular sentiment turns about when, back in 2004, he and other prosecutors opposed Proposition 66, which would have narrowed the three strikes law.<sup>96</sup> It led by a wide margin in the polls until money was pumped into the No-on-66 Campaign and then Governor Arnold Schwarzenegger did a series of ads opposing the law.<sup>97</sup> In short order, his advisors proposed the realignment bill. Green then skirted the Brown Act’s public meeting requirements on the bill with special legislation that expanded the list of leaders who could meet to discuss “public security issues.”<sup>98</sup> He contended that meeting with county supervisors about realignment was within the law

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<sup>94</sup> See generally Nat’l Inst. on Money in State Politics, *supra* note 47.

<sup>95</sup> Lyle Denniston, *Argument Recap: Jousting Over Prisoner Release*, SCOTUSBLOG (Nov. 30, 2010, 1:28 PM), <http://www.scotusblog.com/2010/11/argument-recap-2/>.

<sup>96</sup> Joe Mathews, *How Prospect for Prop. 66 Fell So Far, So Fast*, L.A. TIMES (Nov. 7, 2004), available at <http://articles.latimes.com/2004/nov/07/local/me-pete7/2>.

<sup>97</sup> Megan Garvey, *Big Money Pours In for 3-Strikes Ads*, L.A. TIMES (Oct. 28, 2004), available at <http://articles.latimes.com/2004/oct/28/local/me-threestrikes28/2>.

<sup>98</sup> Josh Richman, *Gov. Jerry Brown's Latest Bill Signature Brings New Criticism of His Open-Government Stance*, MERCURY NEWS (June 24, 2013, 5:28 PM), available at [http://www.mercurynews.com/ci\\_23530752/jerry-browns-latest-bill-signature-brings-new-criticism](http://www.mercurynews.com/ci_23530752/jerry-browns-latest-bill-signature-brings-new-criticism).

because of the urgent public safety concerns that might result from passage of the act.<sup>99</sup>

Green has called Realignment a bold step and more recently has contended that the prison-overcrowding crisis is over.<sup>100</sup> He has also proposed additional funding for the prison system to increase its capacity.<sup>101</sup> During his press conference urging the additional funding, he stood next to one of CCPOA's leaders.<sup>102</sup> His plan for additional funding to expand prison capacity was met with stunned silence from most of the members of his party in the legislature.

In a private conversation, when someone asked him about any interest he may have in sweeping sentencing reform, the governor said, "Weren't you listening to my inaugural speech?"<sup>103</sup> He was referring to several references in his second inaugural speech when he mentioned the continued need for reform of sentencing practices and procedures. "But," his interrogator continued, "what about a sentencing commission? Wouldn't that kind of legislation work?" Green laughed. "Back in 2007, my own party tried to pass legislation like that, but they got into a pissing contest." He was referring, of course, SB 110 and AB 160, both of which passed in their respective houses of the legislature but could not win support in the other chamber.<sup>104</sup> "And then, in 2009, my fellow Democrats ran the other way when they had a bill but were up for reelection."<sup>105</sup>

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

<sup>100</sup> Nick Smith, *Inmates Trade Prison Cells for Jail Under Plan*, ABC 7 NEWS (Oct. 1, 2011), <http://abclocal.go.com/kgo/story?section=news/state&id=8375360>.

<sup>101</sup> Saki Knafo, *California Prison Guards Union Pushes for Prison Expansion*, HUFFINGTON POST (Sept. 9, 2013), [http://www.huffingtonpost.com/2013/09/09/california-prison-guards\\_n\\_3894490.html](http://www.huffingtonpost.com/2013/09/09/california-prison-guards_n_3894490.html).

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

<sup>103</sup> Brown, *supra* note 93.

<sup>104</sup> Carole D'Elia, *The Politics of Public Safety Reform in California*, 22 FED. SENT'G REP. 144, 145 (2010).

<sup>105</sup> See generally Robert Weisberg, *California's De Facto Sentencing Commissions*, 61 STAN. L. REV. ONLINE 1 (Nov. 11, 2011), <http://www.stanfordlawreview.org/online/californias-de-facto-sentencing-commissions>.

A source close to the governor confided that Green “is obsessed with his legacy.”<sup>106</sup> His future political ambition is unclear even as he approaches his 80s. When I asked with a promise of confidentiality whether my source thought that Green’s backing of Realignment would prevent him from backing broader sentencing reform, my source hedged. My source pointed to important environmental and gay rights issues where Green has been a leader<sup>107</sup> and to fiscal responsibility where he has earned respect from members of the Republican Party.<sup>108</sup> But my source did say, somewhat obliquely, Green has a law-and-order streak and that, “He does have a problematic side. He’s the kind of guy who, when he knows he’s wrong, argues harder.”<sup>109</sup> Finally, my source said, “He doesn’t have time for flops.”<sup>110</sup> I could not get my source to explain further. But I left with the impression that Green has convinced himself that Realignment was good legislation and that backing more sweeping reform would make it look like he was capitulating to the three-judge panel.<sup>111</sup>

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<sup>106</sup> Thomas Del Beccaro, *Jerry Brown Stands Atop California's Collapsing House of Cards*, FORBES (July 8, 2013), available at <http://www.forbes.com/sites/thomasdelbeccaro/2013/07/08/jerry-brown-stands-atop-californias-collapsing-house-of-cards/>.

<sup>107</sup> Michelle Garcia, *California: Gov. Appoints Gay Judges to Bench*, ADVOCATE (July 1, 2014), <http://www.advocate.com/california/2014/07/01/california-gov-appoints-gay-judges-bench>; see also, Paul Rogers, *California Drought: Gov. Jerry Brown Says \$10,000-a-Day Fines for Water-Wasting Cities are Not 'Bluster'*, MERCURY NEWS (June 5, 2015), available at [http://www.mercurynews.com/drought/ci\\_28260571/california-drought-jerry-brown-says-10-000-day](http://www.mercurynews.com/drought/ci_28260571/california-drought-jerry-brown-says-10-000-day).

<sup>108</sup> See Jesse Walker, *Five Faces of Jerry Brown*, AM. CONSERVATIVE (Nov. 1, 2009), <http://www.theamericanconservative.com/articles/five-faces-of-jerry-brown/>.

<sup>109</sup> Tim Dickinson, *Jerry Brown's Tough-Love California Miracle*, ROLLING STONE (Aug. 29, 2013), available at <http://www.rollingstone.com/politics/news/jerry-browns-tough-love-miracle-20130829?page=2>.

<sup>110</sup> *Id.*

<sup>111</sup> Jonathan Simon, *'Mass Incarceration Now, Tomorrow, Forever': Gov. Jerry Brown and the Politics of Court Bashing*, BERKELEY BLOG (Apr. 16, 2013), <http://blogs.berkeley.edu/2013/04/16/mass-incarceration-now-tomorrow-forever-gov-jerry-brown-and-the-politicis-of-court-bashing/>. See CAROL TAVRIS & ELLIOT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS (2007), for an interesting account of how cognitive dissonance may cause us to adopt contra-factual positions when we have invested in our beliefs (and how that result in a politician like Governor Brown to reject alternatives to Realignment).

*E. The Future*

California's politicians have been truly resistant to change. Term limits and the influence of the CCPOA have been factors in explaining the timid nature of reform in California, as has the reality of safe districts.<sup>112</sup> But the CCPOA has softened its opposition to reform in recent years<sup>113</sup> and the California Citizens Redistricting Commission has created some more competitive districts that have led to more centrist representatives.<sup>114</sup> Perhaps the best explanation for continued recalcitrance is that old habits die hard. As long as a large number of districts yield conservative Republicans with little incentive to cooperate with Democrats, Republicans will wait for Democrats to adopt sentencing reform and hope for public opinion to swing back to law-and-order with the next crime wave.<sup>115</sup> Perhaps the loss of the Democrats' super-majority and Governor Brown's middle of the road approach to the budget will bring some Republicans back to the table; perhaps, if they feel relevant again, they may be willing to take on sentencing reform.<sup>116</sup>

Given my interest in sentencing reform and earlier prognoses that economic necessity would produce sentencing reform (to date, an overly optimistic view),<sup>117</sup> I should end on a hopeful note. Gavin Newsom *may be* the politician willing to take on the issue. He has organized a commission to study legalizing marijuana.<sup>118</sup> He contends

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<sup>112</sup> See Vitiello, *supra* note 27, at 1275.

<sup>113</sup> See CCPOA, *supra* note 46.

<sup>114</sup> Editorial, *California's Voting Lines of Contention*, L.A. TIMES (Aug. 22, 2003), available at <http://articles.latimes.com/2011/aug/22/opinion/la-ed-redistricting-20110822>.

<sup>115</sup> Robert Greene, *A Year After California's Criminal Justice System Realignment*, L.A. TIMES (Oct. 2, 2012), available at <http://articles.latimes.com/2012/oct/02/news/la-ol-california-criminal-justice-system-realignment20121002>.

<sup>116</sup> Jeremy B. White, *No Senate Supermajority for California Democrats, Assembly Margin Still in Doubt*, SACRAMENTO BEE (Nov. 4, 2014), available at <http://www.sacbee.com/news/politics-government/capitol-alert/article3578189.html>.

<sup>117</sup> See generally Vitiello, *supra* note 3.

<sup>118</sup> Press Release, *ACLU Announces Blue Ribbon Panel Led By Lt. Gov. Gavin Newsom to Study Marijuana Legalization in California*, ACLU OF NORTHERN CALIFORNIA (Oct. 17, 2013), <https://www.aclunc.org/news/aclu-announces-blue-ribbon-panel-led-lt-gov-gavin-newsom-study-marijuana-legalization>.

that the War on Drugs was a failure.<sup>119</sup> He was a strong supporter of Proposition 47, which re-graded a number of felonies as misdemeanors.<sup>120</sup> He did so in part to “break the crime cycle,” by taking savings that he expects from enactment of Proposition 47 and funding treatment for mental illness, addiction rehabilitation, anti-truancy programs and crime victim assistance.<sup>121</sup> He also recognizes that the prison sentencing reform debate has become less ideologically based, less of a hot-button issue.<sup>122</sup>

Newsom looks like the ideal leader, coming to political maturity as law-and-order has lost its former appeal. He has expressed strong views consistent with reform. Potentially, he could take the leadership role necessary to get wholesale reform enacted. Of course, his election as California’s next Governor is not a lock, even if he seems like the strongest candidate in an increasingly blue state.<sup>123</sup> He has yet to endorse a sentencing commission and sentencing guidelines as a major plank of his reform agenda.<sup>124</sup> And a lot may happen in the next three years that could make crime an important issue. Notably, even some liberals have questioned whether Proposition 47 was the best route for reform.<sup>125</sup> It is piecemeal and it may have swept too

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<sup>119</sup> Will Matthews, *Lt Gov. Gavin Newsom “Steps Up and Steps In” for Criminal Justice Reform, Marijuana Legalization*, ACLU OF NORTHERN CALIFORNIA (Mar. 10, 2014), <https://www.aclunc.org/blog/lt-gov-gavin-newsom-%E2%80%9Csteps-and-steps-in%E2%80%9D-criminal-justice-reform-marijuana-legalization>.

<sup>120</sup> Gavin Newsom, *Prop 47: How I’m Voting on This Controversial Issue*, GAVINNEWSOM.COM (Oct. 8, 2014), <http://www.gavinnewsom.com/2014/10/08/prop-47-how-im-voting-controversial-issue/>.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> David Siders, *Gavin Newsome Running Marathon Race for California Governor*, SACRAMENTO BEE (Mar. 16, 2015), available at [www.sacbee.com/news/politics-government/capitol-alert/article14727503.html](http://www.sacbee.com/news/politics-government/capitol-alert/article14727503.html).

<sup>124</sup> *Cf.* Newsom for California Governor 2018, *Rethinking Our Drug Policy*, GAVINNEWSOM.COM, <http://www.gavinnewsom.com/issues/drugpolicy/index.html> (last visited Nov. 3, 2015) (limiting sentencing reform focus to non-violent drug offenses and not a widespread support of sentencing reform or a commission).

<sup>125</sup> See Dianne Feinstein, *Prop. 47 Will Make California Less Safe*, L.A. DAILY NEWS (Oct. 15, 2014, 10:06 AM), available at <http://www.dailynews.com/opinion/20141015/prop-47-will-make-californians-less-safe-dianne-feinstein>.

broadly in some instances.<sup>126</sup> Newsom's full support of Proposition 47 could hurt if California ends up with a beneficiary of Proposition 47's reform committing a heinous crime. As Professors Petersilia and Cullen argue in *Liberal but not Stupid: Meeting the Promise of Downsizing Prisons*, California has adopted reforms in the past that have gotten derailed.<sup>127</sup>

National trends seem to move more quickly in the current age of 24/7 media cycle and access to information. Whether the mood favoring wholesale reform will change before California joins the national trend thus becomes an increasingly important question.

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<sup>126</sup> See, e.g., Jeremy B. White, *Bill Seeks to Reverse Proposition 47's DNA Rollback*, SACRAMENTO BEE (Feb. 19, 2015), available at <http://www.sacbee.com/news/politics-government/capitol-alert/article10695956.html>.

<sup>127</sup> Even a sentencing commission does not necessarily produce good results. See generally Petersilia & Cullen *supra* note 1.