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# SHAPING CALIFORNIA'S PRISONS: HOW THE ALTERNATIVE CUSTODY PROGRAM, DESIGNED TO REMEDY THE STATE'S EIGHTH AMENDMENT VIOLATIONS IN THE PRISON SYSTEM, ENCROACHES ON EQUAL PROTECTION

Emilie A. Whitehurst\*

## INTRODUCTION

The United States of America has an addiction. The federal, state, and local governments collectively consumed over seventy billion dollars for its satiation in 2008.<sup>1</sup> Comparatively, just three decades ago, in 1982, it demanded less than twenty billion in expenditures.<sup>2</sup> By 2008, it was directly affecting one out of every one hundred adults residing in this nation.<sup>3</sup> Incarceration. The United States is addicted to its correctional facilities, and it boasts the greatest incarceration rate in the world.<sup>4</sup>

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<sup>1</sup> JOHN SCHMITT, KRIS WARNER & SARIKA GUPTA, CTR. FOR ECON. & POLICY RESEARCH, THE HIGH BUDGETARY COST OF INCARCERATION 2 (2010), *available at* <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>. Based upon data collected by the Bureau of Justice Statistics, the authors estimate that the United States government expended almost seventy-five billion dollars in 2008 on corrections. *Id.* Incarceration measures received the greatest allotment. *Id.* State governments spent significantly more dollars on corrections than did the local and federal levels, with the federal government spending the least. *Id.* at 10.

<sup>2</sup> *Id.* at 10.

<sup>3</sup> *Prison Count 2010*, PEW CTR. ON THE STATES, 1 (Apr. 2010), [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2010/Pew\\_Prison\\_Count\\_2010.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2010/Pew_Prison_Count_2010.pdf) [hereinafter *Prison Count*]. In 2008, one in every one hundred adults was an inmate at either a local jail or state or federal prison. *Id.* See also *One in 100: Behind Bars in America 2008*, PEW CTR. ON THE STATES (2008), [http://www.pewtrusts.org/uploadedfiles/PCS\\_Assets/2008/one%20in%20100.pdf](http://www.pewtrusts.org/uploadedfiles/PCS_Assets/2008/one%20in%20100.pdf) [hereinafter *One in 100*].

<sup>4</sup> See SCHMITT ET AL., *supra* note 1, at 1. The United States, as of 2008, was imprisoning 753 people for every 100,000. *Id.* Russia was next in line with 629 inmates for every 100,000 people. *Id.* at 4–5. When compared to other fiscally strong nations participating in the Organization for Economic Cooperation and Development, the United States, in 2009, was at the forefront of the incarceration movement with a staggering lead. *Id.* at 3. Poland, ranking second in its incarceration rate among countries belonging to the Organization for Economic Cooperation and Development, followed the United States with a meager rate of 224 inmates for every 100,000 people. *Id.* Iceland had the lowest rate with just forty-four individuals in prison or jail for every 100,000 people. *Id.*

Most of these inmates are placed in State prisons and jails,<sup>5</sup> where the deadly combination of population overcrowding and a dire lack of resources cultivate an atmosphere that can inhumanely infringe on inmates' Eighth Amendment rights.<sup>6</sup>

The State correctional facilities in California foster particularly heinous environments. So heinous, in fact, that in 2006, former California Governor Arnold Schwarzenegger announced that California was in a state of public safety emergency.<sup>7</sup> It is no wonder then, that this state—the frontrunner in correctional system spending<sup>8</sup>—has captured negative judicial attention.<sup>9</sup> On May 23, 2011, the Supreme Court, in an opinion delivered by Justice Kennedy, held that California's state prisons were operating at such overcapacity as to directly inflict cruel and unusual punishment on California inmates, an Eighth Amendment violation.<sup>10</sup> The Court therefore affirmed a lower court's order directing California to reduce its prison overcrowding by a specified percentage over the next two years.<sup>11</sup> The question plaguing the governor, legislators, wardens and civilians is how to bring the State into compliance with this order.<sup>12</sup> Other states—including Virginia—that fear the imminence of similar judicial mandates of their own

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<sup>5</sup> *Id.* at 10 (estimating that 60% of the nation's incarcerated individuals are held in State correctional facilities).

<sup>6</sup> *See, e.g.,* *Brown v. Plata*, 131 S. Ct. 1910, 1923, 1947 (2011) (“For years the medical and mental health care provided by California’s prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners’ basic health needs. . . . [O]vercrowding is the ‘primary cause of the violation of a Federal right,’ specifically the severe and unlawful mistreatment of prisoners through grossly inadequate provision of medical and mental health care. . . . The medical and mental health care provided by California’s prisons falls below the standard of decency that inheres in the Eighth Amendment.” (citation omitted) (quoting 18 U.S.C. § 3626(a)(3)(E)(i)). *See generally* Terence P. Thornberry & Jack E. Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects*, 35 HASTINGS L.J. 313 (1983) (examining—through case outcomes—when injurious prison conditions are considered by the judiciary to have escalated to the point of being cruel and unusual, with a specific focus on prison overcrowding).

<sup>7</sup> Don Thompson, *California Inmate Release: Schwarzenegger Prison Reform Policies Were Mixed*, HUFFINGTON POST (May 24, 2011), [http://www.huffingtonpost.com/2011/05/24/california-inmate-release\\_n\\_866189.html?view=print](http://www.huffingtonpost.com/2011/05/24/california-inmate-release_n_866189.html?view=print).

<sup>8</sup> *One in 100*, *supra* note 3, at 11 (“[Thirteen] states now devote more than \$1 billion a year in general funds to their corrections systems. The undisputed leader is California, where spending totaled \$8.8 billion [in 2007].”).

<sup>9</sup> *See id.* (“California vividly symbolizes the financial perils of the state prison business. On top of the perennial political tug-of-war, the state’s whopping corrections budget is shaped by a bevy of court settlements that make predicting and controlling spending tricky. Following successful lawsuits by prisoner plaintiffs, California now is subject to court oversight of inmate medical and dental care, mental health services, its juvenile offenders, and the treatment of disabled inmates. Even its parole revocation system is controlled by a legal settlement, and thereby subject to judicial orders that influence spending.”).

<sup>10</sup> *Plata*, 131 S. Ct. at 1918–19, 1947.

<sup>11</sup> *Id.* at 1922–23, 1945–47.

<sup>12</sup> *See id.* at 1943, 1946–47.

will be carefully observing California over the next two years, to see how America's guinea pig in prison reform will tackle its share of this national problem.<sup>13</sup> However, these States would be ill-advised to adopt all of California's remedial plans in their current frameworks.

Unfortunately, at least one of California's current proposals to remedy the Eighth Amendment violation in its penitentiary system is being executed in a constitutionally unacceptable manner and therefore is not, in its present enactment, a sufficient remedy to a problem fraught with economic, political and societal concerns.<sup>14</sup> The proposal, titled the Alternative Custody Program, clearly runs afoul of the Constitution's guarantee of equal protection. This Note examines that initiative, and elucidates its constitutional flaws. Part I establishes the foundational basis with a discussion of inmate rights—as they are inherently limited in comparison to the free population's—and the Eighth and Fourteenth Amendments as they apply to State prisons. The section then discusses the conditions in California State prisons, as they have become the nation's testing ground for prison reform, and focuses on how one particular condition—prison overcrowding—was judicially deemed an Eighth Amendment violation by the California federal courts in *Coleman v. Wilson*,<sup>15</sup> *Plata v. Schwarzenegger*,<sup>16</sup> *Coleman*

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<sup>13</sup> See Michael Doyle, *Supreme Court Orders California to Release Prisoners*, STATE COALITION OF PROB. ORGS., <http://www.scopo.org/legislative110523.html> (last visited Oct. 14, 2012) (“Eighteen states—including Texas, Alaska and South Carolina—explicitly supported California's bid for more leeway in reducing prison overcrowding. These states worry that they, too, might face court orders to release inmates.”). For a complete listing of, and the arguments made by, the eighteen states, including Virginia, that petitioned the Supreme Court to favor California and not order a prison reduction, see generally Brief for the States of Louisiana et al. as Amici Curiae in Support of Appellants, *Plata*, 131 S. Ct. 1910 (No. 09-1233), 2010 WL 3501185 [hereinafter Brief for the States of Louisiana et al.].

<sup>14</sup> Prison overcrowding is positively correlated with an increase in prison costs, which drain state treasuries. See *One in 100*, *supra* note 3, at 11 (“The primary catalyst behind the increase [in prison cost] is obvious: prison growth means more bodies to feed, clothe, house and supervise.”). Prison costs have been on the rise for twenty years and, as a result, States have become financially unable to devote general funds to other social causes, such as transportation, higher education, and Medicaid. *Id.* at 14–15. For a more detailed analysis of the economic impact that prison overcrowding has had on States' civil programs, see *id.* at 14–16. Traditionally, politicians have favored a “tough on crime” platform, which translates into harsher sentencing and increased use of incarceration. See *id.* at 17. The economic viability of harsher sentencing appears to be changing this political framework, but it is still a driving force that will continue to influence States' approaches to incarceration policies and prison reform. See *id.* at 17, 21. It is not surprising that this general political stance reflects society's traditional preference for incarceration, driven by its concern for public safety, desire for retribution, and position on morality—i.e., that criminals are bad people who should be locked away from the general public. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 998–1000 (1991) (Kennedy, J., concurring) (discussing the role of the legislature in establishing the principles of the penal system and how at different times, the goals of retribution, deterrence, incapacitation, and rehabilitation have been weighed differently).

<sup>15</sup> 912 F. Supp. 1282 (E.D. Cal. 1995).

<sup>16</sup> No. C01-1351 TEH, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005).

*v. Schwarzenegger*,<sup>17</sup> and by the United States Supreme Court in *Brown v. Plata*.<sup>18</sup> Part II conducts an overview of California's response to the overcrowding problem, and its much touted initiative, Public Safety Realignment of 2011 ("Realignment"). One of California's current proposals, which falls under the umbrella of Realignment, is the Alternative Custody Program.<sup>19</sup> The program is intended to remedy the Eighth Amendment violation, but it is constitutionally problematic in its own right. Indeed, it treads on the Fourteenth Amendment. Part III unfurls the program's constitutional shortcomings, specifically in the context of equal protection, and Part IV offers a recommendation for bringing the Alternative Custody Program into conformity with the Constitution.

### I. PROTECTION OF INMATE RIGHTS

Prisoners are not afforded all of the constitutional rights that they enjoyed prior to incarceration.<sup>20</sup> Limiting or suspending constitutional protections otherwise available to the free population is acceptable in the prison context as long as the restrictions "bear a rational relation to legitimate penological interests."<sup>21</sup> Those rights that

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<sup>17</sup> No. CIV S-90-0520 LKK JFM P, 2010 WL 99000 (E.D. Cal. Jan. 12, 2010).

<sup>18</sup> 131 S. Ct. 1910 (2011).

<sup>19</sup> Specifically, the Alternative Custody Program places female inmates who are the primary caretakers of children in their households in a correction program outside of a prison or jail. *See infra* Part III. Other initiatives include releasing those inmates with the worst medical conditions, transferring State prison inmates to other state-run or privately contracted prisons, and placing new and future offenders in county prisons instead of State prisons. *See infra* Part II. Only the female release program will be addressed in detail by this Note.

<sup>20</sup> *See, e.g.,* *Overton v. Bazzetta*, 539 U.S. 126 (2003) (upholding a state prison regulation that limits inmates' rights to freedom of association); *Ortiz v. Fort Dodge Corr. Facility*, 368 F.3d 1024 (8th Cir. 2004) (upholding a prison policy that prohibited an inmate from writing a letter in Spanish to his family, despite the inmate's contention that the regulation violated the First Amendment); *Veney v. Wyche*, 293 F.3d 726 (4th Cir. 2002) (upholding a prison regulation that required male inmates to be housed in single occupancy cells on the basis of their homosexual orientation, despite inmate allegations that the segregation was an equal protection violation).

<sup>21</sup> *Bazzetta*, 539 U.S. at 132. In *Bazzetta*, the plaintiffs, a group composed partly of Michigan state prisoners, alleged that the Michigan Department of Corrections violated their First, Eighth, and Fourteenth Amendment rights when it employed additional restrictions on the types of visitors that inmates could receive on non-contact visits. *Id.* at 128–31. The Supreme Court acknowledged the importance of "accord[ing] substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Id.* at 132. *See also* *Matthews v. Wiley*, 744 F. Supp. 2d 1159 (D. Colo. 2010). In *Wiley*, the inmate plaintiff argued that his transfer to another correctional facility violated his Fifth Amendment right to procedural due process. *Id.* at 1167. The court held that there was a "legitimate penological interest" that would be furthered by transferring the plaintiff to the different facility. *Id.* at 1171. The plaintiff consistently engaged in violence during his incarceration

would run contrary to “proper incarceration” will not be upheld.<sup>22</sup> Legitimate interests may include prison guard and inmate safety, the well-being of visitors, proper conservation of prison resources, and correctional facility security,<sup>23</sup> as well as prisoner rehabilitation.<sup>24</sup> Rights such as freedom of association<sup>25</sup> and freedom of speech,<sup>26</sup> and activities ranging from outdoor recreation<sup>27</sup> to social commentary<sup>28</sup> and physical expression<sup>29</sup> therefore have been duly limited.

However, as noted by the Supreme Court in *Brown v. Plata*, “the law and the Constitution demand recognition of certain other rights.”<sup>30</sup> Therefore, while States

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and had escaped from prison. *Id.* The legitimate interests of safety and security, therefore, warranted his placement in a more secure environment. *See id.* at 1171–74.

<sup>22</sup> *Bazzetta*, 539 U.S. at 131.

<sup>23</sup> *See id.* at 133–35 (finding legitimate prison interests to include internal security, reducing the risk of crime, protecting minors from inappropriate inmate behavior, minimizing the opportunity for drug and alcohol circulation, preservation of facility resources, and general safety); *Kuperman v. Wrenn*, 645 F.3d 69 (1st Cir. 2011) (holding that a restriction on the length of inmate facial hair was not a violation of freedom of expression under the First Amendment because the restriction facilitated inmate identification, hampered inmates’ abilities to conceal prohibited items on their persons, would make it more difficult for inmates to speedily alter their physique during an escape, and therefore furthered the legitimate prison interests of security and safety); *Singer v. Raemisch*, 593 F.3d 529 (7th Cir. 2010) (finding that a prohibition on fantasy role playing was not an unconstitutional violation of freedom of speech under the First Amendment because the role playing promoted antagonistic behavior and gang activity that risked prison security, the sustainment of which is a legitimate penological interest); *Peterkin v. Jeffes*, 855 F.2d 1021 (3d Cir. 1988) (deciding that it was not an Eighth Amendment violation for a prison to place stricter parameters on the nature and mode of physical exercise and recreation for capital inmates when the purpose is to reduce the risk of such inmates collaborating in plans, staging escapes, and collecting hostages—activities that would compromise prison security, a legitimate prison interest).

<sup>24</sup> *See Koutnik v. Brown*, 456 F.3d 777, 781, 784 (7th Cir. 2006) (“[T]he facility had a substantial interest in rehabilitating [plaintiff inmate]. . . . There is no question that the rehabilitation of inmates is a legitimate interest of penal institutions.”).

<sup>25</sup> *See, e.g., Bazzetta*, 539 U.S. 126 (holding that it was not a First Amendment violation for a prison to place restrictions on the types of people that can visit inmates).

<sup>26</sup> *See, e.g., Singer*, 593 F.3d at 531; *Nasir v. Morgan*, 350 F.3d 366 (3d Cir. 2003) (finding that it was not a First Amendment violation for a prison to disallow current inmates from communicating with former inmates).

<sup>27</sup> *See, e.g., Peterkin*, 855 F.2d 1021.

<sup>28</sup> *See, e.g., Koutnik*, 456 F.3d at 785–86 (finding that it was not a First Amendment freedom of speech violation to seize inmate plaintiff’s outgoing mail that “attempt[ed] to market symbols affiliated with racially intolerant groups” because the communications “thwarted the State’s legitimate goals ‘to encourage the plaintiff to live crime-free when he is released from custody’ and to foster ‘the ability to resolve conflicts without resorting to violence, and to recognize that successful reintegration into society requires respecting the rights of others.’ Accordingly, the confiscation of his outgoing mail . . . ‘further[ed] [the] important . . . governmental interest’ in rehabilitation.” (citations omitted)).

<sup>29</sup> *See, e.g., Kuperman v. Wrenn*, 645 F.3d 69, 74–75 (1st Cir. 2011).

<sup>30</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

can establish their own penological interests and further them through prison policies and management, States are not granted the unchecked ability to infringe on every protection embodied in the Constitution.<sup>31</sup> In 1987, the Supreme Court established four criteria against which the judiciary is advised to weigh alleged prison violations.<sup>32</sup> A limitation on a prisoner's constitutional rights may be permissible if the restriction is "reasonably related to [a] legitimate penological interest[ ]."<sup>33</sup> To make this determination, the Supreme Court counseled lower courts to consider:

- (1) whether there is a rational relationship between the regulation and the legitimate government interest advanced;
- (2) whether the inmates have alternative means of exercising the restricted right;
- (3) whether and the extent to which accommodation of the asserted right will impact prison staff, inmates' liberty, and the allocation of limited prison resources; and
- (4) whether the contested regulation is an "exaggerated response" to prison concerns and if there is a "ready alternative" that would accommodate inmates' rights.<sup>34</sup>

In cases in which a prison inmate is alleging a constitutional violation as a result of a prison ordinance or restriction, the inmate bears the burden of proof with respect

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<sup>31</sup> See *Ewing v. California*, 538 U.S. 11, 25 (2003) ("Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution 'does not mandate adoption of any one penological theory.'" (quoting *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring))); *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring) ("The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation."); *Singer*, 593 F.3d at 535 ("We note that Wisconsin, like all other states, is permitted to pursue its chosen penological goals and objectives so long as its actions in doing so remain within the bounds of the Constitution."); *Peterkin*, 855 F.2d at 1032–33 ("[T]he Supreme Court has repeatedly stated, and we have reiterated, that prison administrators must be afforded wide-ranging deference in adopting and carrying out policies that in their reasonable judgment are necessary to preserve order, discipline, and security. . . . [A] federal court [is not authorized] to second guess their decisions nor is it our role to express our agreement or disagreement with their overall policies or theories of prison administration, as long as we find no constitutional violation." (citations omitted)).

<sup>32</sup> *Turner v. Safley*, 482 U.S. 78 (1987).

<sup>33</sup> *Singer*, 593 F.3d at 534.

<sup>34</sup> *Id.* (quoting *Turner*, 482 U.S. at 89–91). For examples of cases where courts applied this test as set forth by the Supreme Court in *Turner*, see also *Beard v. Banks*, 548 U.S. 521, 528–29, 531–33 (2006) (applying the *Turner* four-factor test to a Pennsylvania prison's policy on restricted access to print media); *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (applying the *Turner* four-factor test to a prison ordinance that regulated the types of visitors inmates could receive); *Kuperman*, 645 F.3d at 74–77 (applying the *Turner* four-factor test to a New Hampshire state prison's regulation requiring inmates to trim their facial hair).

to the reasonableness or legitimacy of that restriction, as measured by these factors dictated by the Supreme Court.<sup>35</sup> As expressed in *Ewing v. California*,<sup>36</sup> courts customarily defer to the prison policy makers.<sup>37</sup> Judges recognize that there are a multitude of restrictions that could fall within the “bounds of the Constitution,”<sup>38</sup> and that such policies are best determined outside the judiciary.<sup>39</sup> Therefore, the inmate’s burden of proof is not easy to satisfy.<sup>40</sup> When an inmate does satisfy this burden, however, the court will cease its deference and “discharge [its] duty to protect constitutional rights.”<sup>41</sup> Such rights afforded to inmates include equal protection,<sup>42</sup> the right to exercise their religious beliefs,<sup>43</sup> the right to marry,<sup>44</sup> the right to access courts from within the confines of a prison or jail,<sup>45</sup> the right to receive due process,<sup>46</sup> and the right to be protected against cruel and unusual punishment.<sup>47</sup> The first and last of

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<sup>35</sup> See *Bazzetta*, 539 U.S. at 132 (“The burden . . . is not on the State to prove the validity of prison regulations but on the prisoner to disprove it.”); *Singer*, 593 F.3d at 534.

<sup>36</sup> 538 U.S. 11 (2003).

<sup>37</sup> *Ewing*, 538 U.S. at 12 (“[T]his Court has a longstanding tradition of deferring to state legislatures in making and implementing such important [prison] policy decisions.”).

<sup>38</sup> *Singer*, 593 F.3d at 535.

<sup>39</sup> See *Bazzetta*, 539 U.S. at 132, 135; *Singer*, 593 F.3d at 534–36.

<sup>40</sup> *Singer*, 593 F.3d at 534.

<sup>41</sup> *Procunier v. Martinez*, 416 U.S. 396, 405–06 (1974) (“But a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.”) *overruled on other grounds by* *Thornburgh v. Abbot*, 109 S. Ct. 1874 (1989).

<sup>42</sup> See, e.g., *McCoy v. Nevada Dept. of Prisons*, 776 F. Supp. 521, 523 (D. Nev. 1991) (noting that women offenders should be “treated in parity” with their male counterparts (quoting *Dawson v. Kendrick*, 527 F. Supp. 1252 (S.D.W. Va. 1981) (internal quotation marks omitted))); *Bukhari v. Hutto*, 487 F. Supp. 1162 (E.D. Va. 1980); *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966) (deciding that racial segregation in prisons and jails violated the Fourteenth Amendment), *aff’d*, 390 U.S. 333 (1968); see also William Bennett Turner, *Establishing the Rule of Law in Prisons: A Manual For Prisoners’ Rights Litigation*, 23 STAN. L. REV. 473, 490–91 (1971).

<sup>43</sup> See, e.g., *Shaheed-Muhammad v. Dipaolo*, 393 F. Supp. 2d 80 (D. Mass. 2005) (finding that inmates have a First Amendment right to practice—within reason—their religious principles, as long as those principles are held in good faith).

<sup>44</sup> See, e.g., *Turner v. Safley*, 482 U.S. 78 (1987) (holding that prisoners have a constitutionally protected right to marry other inmates).

<sup>45</sup> See, e.g., *Johnson v. Avery*, 393 U.S. 483 (1969) (holding prison measures that prohibited inmates from helping one another with release petitions were unconstitutional because they thwarted inmates’ protected right to seek habeas corpus).

<sup>46</sup> See, e.g., *Austin v. Wilkinson*, 189 F. Supp. 2d 719 (N.D. Ohio 2002) (finding that inmates who are transferred to a higher security prison should receive notice of the reasons motivating the transfer, as the transfer affects the inmates’ liberty interests, which are protected by due process).

<sup>47</sup> See, e.g., *Brown v. Plata*, 131 S. Ct. 1910 (2011); *Hudson v. McMillian*, 503 U.S. 1 (1992) (using unrestrained physical force on inmates, regardless of whether the inmate sustains serious injury, can be cruel and unusual punishment as prohibited by the Eighth Amendment).



these rights—enumerated in the Fourteenth and Eighth Amendments, respectively—are of particular interest here.

*A. Protecting the Right to Equal Protection in Prison*

The Fourteenth Amendment requires that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>48</sup> Courts have consistently recognized prison inmates’ rights to equal protection in a variety of contexts, including gender discrimination.<sup>49</sup> In *Keevan v. Smith*,<sup>50</sup> female inmates in Missouri complained that the Missouri Department of Corrections and Human Resources violated the Fourteenth Amendment by denying them “equal access . . . to post-secondary educational programs and . . . to prison industry employment”<sup>51</sup> merely because they were females.<sup>52</sup> Although the court acknowledged that it is natural and expected for different prisons to offer different programs,<sup>53</sup> it also noted that a disparity in offerings cannot be constitutional if it is predicated on a desire to treat “similarly situated” inmates differently solely because some are considered to be members of a “protected class.”<sup>54</sup> The court found that in this particular case, the female appellants were not similarly situated to the male inmates housed in the other institutions and who allegedly received preferential treatment, because they had substantially different security classifications, population levels, and sentence terms.<sup>55</sup> The court, however, did explain that had the inmates been similar with regard to the aforementioned factors, then the varying levels of access to the prison programs would run afoul of the Fourteenth Amendment if they had a disproportionately negative impact on female inmates and were rooted in invidious intent.<sup>56</sup>

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<sup>48</sup> U.S. CONST. amend. XIV, § 1.

<sup>49</sup> See *supra* notes 42–47 and accompanying text.

<sup>50</sup> 100 F.3d 644 (8th Cir. 1996).

<sup>51</sup> *Id.* at 645.

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

<sup>53</sup> *Id.* at 651 (“Because no two prisons are the same, it is a virtual certainty that inmates in one prison will have certain amenities not available to inmates in another.”).

<sup>54</sup> *Id.* at 647–48 (“To establish a gender-based claim under the Equal Protection Clause, the appellants must, as a threshold matter, demonstrate that they have been treated differently by a state actor than others who are similarly situated simply because appellants belong to a particular protected class.”). The question of whether male and female inmates are similarly situated turns on various factors. See *Wiley v. Trapp*, No. 03-4133, 2004 WL 2011453, at \*2 (D. Kan. Aug. 16, 2004). Typically, courts will compare the number of prisoners housed in their respective facilities, their security level, the reason for their incarceration, the nature of their sentence, and any additional, relevant factors arising under the circumstances. *Id.*

<sup>55</sup> *Keevan*, 100 F.3d at 648–49.

<sup>56</sup> *Id.* at 650–51 (“Even assuming . . . that male and female inmates were similarly situated for purposes of the Department’s placement of prison industries, an equal protection review of Department decisions requires further analysis. . . . [A facially] neutral policy employed by the Department [that] has a disproportionately adverse effect upon women [will

In *Glover v. Johnson*,<sup>57</sup> female inmates brought a successful equal protection claim against the Michigan Department of Corrections, alleging that the Department provided male inmates with “educational and vocational rehabilitation opportunities,” pay rates, libraries, and work pass programs that were significantly better than those available to their female counterparts.<sup>58</sup> Applying intermediate scrutiny,<sup>59</sup> the court found that the Department was “bound to provide women inmates with treatment and facilities that are substantially equivalent to those provided the men—i.e., equivalent in substance if not in form—unless their actions, though failing to do so, nonetheless bear a fair and substantial relationship to achievement of . . . correctional objectives.”<sup>60</sup> The district court judge then issued an order directing the Department to allow female inmates to participate in a post-secondary education program that was analogous to that which was already offered to male prisoners, and to launch in the women’s prison a vocational program of the same caliber as the men’s.<sup>61</sup>

Other courts have held similarly,<sup>62</sup> and, as expressed by the United States District Court in the District of Columbia, “[w]here there is a showing that vocational or educational programs offered to women are different than those offered to men, and further, that the program offered to women is *inferior* to that offered to the men, then a fundamental constitutional question has been raised.”<sup>63</sup>

### *B. Upholding the Eighth Amendment in Prison*

The scope of the Eighth Amendment’s prohibition of cruel and unusual punishment as it applies in the prison context has been extensively litigated. It encompasses undue physical force used on inmates,<sup>64</sup> egregious implementation of solitary

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be] unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.” (citation omitted)).

<sup>57</sup> 478 F. Supp. 1075 (E.D. Mich. 1979).

<sup>58</sup> *Id.* at 1077.

<sup>59</sup> *Id.* at 1078.

<sup>60</sup> *Id.* at 1079.

<sup>61</sup> *Id.* at 1102–03.

<sup>62</sup> *See, e.g.,* *Canterino v. Barber*, 564 F. Supp. 711 (W.D. Ky. 1983). In *Kentucky*, female prisoners were given unequal access to vocation programs designed to help rehabilitate inmates. *Id.* at 712. Male inmates had comparatively greater access, and the discrepancy was evidently tied to gender. *Id.* at 712, 715. Moreover, the programs that were available to female inmates “demonstrate[d] a very traditional view of women and a desire to train them only for traditional women’s work. The Supreme Court expressly rejects such a purpose as a justification for explicit gender-based classifications.” *Id.* at 715 (citations omitted).

<sup>63</sup> *Pitts v. Meese*, 684 F. Supp. 303, 313 (D.D.C. 1987). In *Pitts*, female inmates alleged that the District violated their guarantee of equal protection by sending women to prisons that were more geographically isolated than the prisons designated for men. *Id.* at 304–06. In addition to making it significantly more difficult to receive visitors, these facilities allegedly lacked the beneficial programs that were employed in the men’s prisons. *Id.* at 306.

<sup>64</sup> *See, e.g.,* *Wilkins v. Gaddy*, 130 S. Ct. 1175 (2010) (holding that in order to conclude that an inmate suffered unconstitutional physical force, as prohibited by the Eighth Amendment,

confinement,<sup>65</sup> inhumane prison conditions,<sup>66</sup> and inadequate access to food,<sup>67</sup> shelter, clothing, and medical care.<sup>68</sup>

In order for a prisoner to be successful in an Eighth Amendment claim regarding the circumstances of his incarceration, he “must show that, judged by contemporary standards of decency, the conditions either ‘involve the wanton and unnecessary infliction of pain,’ that they are ‘grossly disproportionate to the severity of the crime,’ or that they entail ‘serious deprivation of basic human needs.’”<sup>69</sup> This factual determination must be coupled with a finding that the prison officials perpetuated the harm by acting with “deliberate indifference” to the unreasonable impact on inmate safety and well-being.<sup>70</sup> Specifically, “deliberate indifference” arises in a case where the prison official is knowledgeable of the contested circumstances, and reasons that those circumstances may result in considerable injury to the inmate, but ignores the risk in spite of such knowledge.<sup>71</sup>

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a court does not have to find that the inmate sustained substantial physical injury); *Hudson v. McMillian*, 503 U.S. 1 (1992) (finding that the use of physical force can constitute cruel and unusual punishment in violation of the Eighth Amendment even if an inmate does not suffer substantial injury).

<sup>65</sup> *Turner*, *supra* note 42, at 492–95.

<sup>66</sup> *See, e.g.*, *Brown v. Plata*, 131 S. Ct. 1910 (2011) (severe prison overcrowding); *Farmer v. Brennan*, 511 U.S. 825 (1994) (prison violence); *French v. Owens*, 777 F.2d 1250 (7th Cir. 1985) (inadequate physical living space and accommodations for inmates). *See generally* *Thornberry & Call*, *supra* note 6, at 313, 318 (discussing the unconstitutional results of prison overcrowding and the factors that may trigger an Eighth Amendment infraction—inadequacies in lighting, plumbing, cleanliness of eating areas, vermin population, fire protection, bedding, and protection of inmates).

<sup>67</sup> *See, e.g.*, *French*, 777 F.2d at 1255 (discussing the inferior dietary regimens for inmates).

<sup>68</sup> *See Plata*, 131 S. Ct. 1910; *Matthews v. Wiley*, 744 F. Supp. 2d 1159, 1175 (D. Colo. 2010).

<sup>69</sup> *Georgacarakos v. Wiley*, No. 07-cv-01712-MSK-MEH, 2010 WL 1291833, at \*11 (D. Colo. Mar. 30, 2010) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)); *see also Matthews*, 744 F. Supp. 2d at 1175.

<sup>70</sup> *Matthews*, 744 F. Supp. 2d at 1176 (“An Eighth Amendment claim includes both an objective component, whether the deprivation of a basic human need is sufficiently serious, and a subjective component, whether the officials acted with a sufficiently culpable state of mind. . . . The ‘deliberate indifference’ subjective standard applies to claims of inhumane conditions of confinement.” (citations omitted)); *see also Wilson v. Seiter*, 501 U.S. 294, 297 (1991).

<sup>71</sup> *Matthews*, 744 F. Supp. 2d at 1176 (“A finding of deliberate indifference requires a showing that the defendant ‘knows of and disregards an excessive risk to inmate health or safety.’ Under this standard, ‘the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.’” (citations omitted) (quoting *Farmer*, 511 U.S. at 837)); *see also Farmer*, 511 U.S. at 845–46 (noting that a prison official’s indifference to a major threat to prisoner health and well-being may be evidenced by the official’s refusal to try to decrease the likelihood of harm).

In recent years, with incarceration on a rise,<sup>72</sup> prison overcrowding<sup>73</sup> has become a particularly significant cause of constitutionally unacceptable prison conditions and inadequate access to basic life necessities.<sup>74</sup> When a prison operates at overcapacity, there is a high risk that inmates will not receive proper medical care.<sup>75</sup> This lack of adequate treatment<sup>76</sup> is what motivated the Supreme Court in *Brown v. Plata* to order California, whose prisons operate at nearly 200% of design capacity, to reduce its capacity to 137.5%.<sup>77</sup> *Brown* was the culmination of two earlier California cases brought on behalf of inmates suffering from severe mental and physical health problems.<sup>78</sup> In 1995, the Eastern District of California affirmed a magistrate judge's findings that State prisoners under the jurisdiction of the California Department of Corrections were not receiving suitable mental health treatment and that this inadequacy violated the Eighth Amendment.<sup>79</sup> The Department did not have a proper methodology in place for determining whether inmates suffered from mental illness, there were not enough prison employees trained to deal with mentally ill inmates, and the prison failed to monitor the ability of its existing employees to handle the mentally ill.<sup>80</sup> Moreover, not all inmates who required treatment received it, and when they did, it was often untimely, not properly recorded, and the medications were improperly administered.<sup>81</sup>

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<sup>72</sup> See generally SCHMITT ET AL., *supra* note 1.

<sup>73</sup> For more information on overcrowded state prisons, see generally *Prison Overcrowding*, AM. LEGISLATIVE EXCH. COUNCIL, <http://www.alec.org/initiatives/prison-overcrowding/> (last visited Oct. 14, 2012).

<sup>74</sup> The Supreme Court addressed the problem of prison overcrowding for the first time in 1979, in *Bell v. Wolfish*, 441 U.S. 520. In *Wolfish*, the inmate cells were designed for individual occupancy, but, due to substantial increases in population, the cell occupancy was doubled. *Id.* at 525–26. See also Thornberry & Call, *supra* note 6, at 315–16. According to Thornberry and Call, soon after *Wolfish* was decided, some courts that were faced with prison overcrowding paid relatively little attention to the dangers of such overcrowding. *Id.* at 321. Over time, the judiciary's focus shifted to the consequences of prison overcrowding and placed greater weight on statistical findings and expert testimony. *Id.* at 321, 327–28. The most recent Supreme Court case on prison overcrowding is *Brown v. Plata*, 131 S. Ct. 1910 (2011).

<sup>75</sup> See generally Thornberry & Call, *supra* note 6, at 336–51 (discussing how prison overcrowding increases the rate of inmate physical and mental illness, increases inmate stress and hypertension, and is positively correlated to inmate death and suicide rates).

<sup>76</sup> As of 2009, California prisons were housing twice the optimal number of inmates. See *Plata*, 131 S. Ct. at 1923. Therefore, their medical facilities, if they were operating efficiently, would be able to serve only half of the inmate population. Indeed, inmates experienced significant delays in treatment, with medical wait-lists as long as 700 prisoners. *Id.* at 1923–25, 1933.

<sup>77</sup> *Id.* at 1923, 1947.

<sup>78</sup> *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005) (addressing inadequate physical health care); *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995) (discussing inadequate mental health care).

<sup>79</sup> *Coleman*, 912 F. Supp. at 1293, 1296–97, 1324.

<sup>80</sup> *Id.* at 1296–97.

<sup>81</sup> *Id.* at 1297.

Furthermore, the prison officials were aware of these circumstances, recognized the risk that they posed to inmate health and safety, and did not endeavor to reduce that risk.<sup>82</sup> These findings collectively led the court to hold that the prison conditions violated the inmates' right to be protected from cruel and unusual punishment.<sup>83</sup> Accordingly, the Department was ordered to implement, through means decided by it, a mental health care system that would bring the prison into conformance with the Eighth Amendment.<sup>84</sup>

In 2001, the District Court in the Northern District of California found that the medical health care system in California state prisons was substandard.<sup>85</sup> To illustrate, the court noted that one inmate dies every week, on average, in a California prison as a result of inadequate healthcare.<sup>86</sup> Unfortunately, the steady incline in the prison population paralleled a decrease in the utilization of healthcare resources.<sup>87</sup> Additionally, the court found that within the prisons, there were organizational impediments, little medical management, incompetency in existing medical staff, and not enough qualified doctors.<sup>88</sup> These problems led to unnecessary deaths and morbidity among inmates.<sup>89</sup>

The court gave California two years to make improvements in seven prisons, and then mandated the State to continue improvements at a specified rate until every prison was brought into compliance.<sup>90</sup> As of 2005, however, the problem was persisting to the court's dissatisfaction, and the litigation continued until 2011,<sup>91</sup> when the Supreme Court addressed the prison healthcare system—as it applies to both mental and physical health—in California.<sup>92</sup> Prior to the Supreme Court's review of this issue, California was ordered by a three-judge panel, in compliance with the Prison

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<sup>82</sup> *Id.* at 1297, 1304.

<sup>83</sup> *Id.* at 1296–98, 1315, 1319, 1323.

<sup>84</sup> *Id.* at 1301–02. The court was not required to:

specify the exact mechanisms for screening inmates, or the number of staff that must be hired, or the specific level of competence that must be possessed by staff, or the precise methods of medication management to be used, or the manner of maintaining medical records. Indeed, it would have been error to do so.

*Id.* at 1302.

<sup>85</sup> *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2005 WL 2932253, at \*1 (N.D. Cal. Oct. 3, 2005).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at \*3.

<sup>88</sup> *Id.* at \*3–7.

<sup>89</sup> *Id.* at \*7–9. Note that morbidity is interpreted by the court to mean “any significant injury, harm or medical complication that falls short of death.” *Id.* at \*8.

<sup>90</sup> *Id.* at \*2.

<sup>91</sup> For a historical synopsis of this line of cases, see *Plata v. Schwarzenegger*, 560 F.3d 976, 979 (9th Cir. 2009).

<sup>92</sup> *Brown v. Plata*, 131 S. Ct. 1910 (2011).

Litigation Reform Act<sup>93</sup> (PLRA), to reduce prison overcrowding until the prisons were operating at no more than 137.5% of design capacity.<sup>94</sup> According to the PLRA<sup>95</sup> a court may not direct a prison to release inmates unless certain criteria are satisfied.<sup>96</sup> First, a court must have already ordered for a “less intrusive” means of relief and that order must have been unable to bring the prison into constitutional compliance.<sup>97</sup> The prison must also have been given a reasonable period of time during which it could come into compliance.<sup>98</sup> If a prison release order is necessary in order to remedy the violation, then it may only be issued by a panel of three judges,<sup>99</sup> and such a panel must first find by clear and convincing evidence that the infraction was caused by overcrowding and that there is no means, other than a release, by which the violation can be addressed.<sup>100</sup> Here, the three-judge court found that overcrowding was the principal cause of the insufficient administration of medical services to California inmates.<sup>101</sup> With all of the criteria of the PLRA met, the court issued the release order, leading California to seek review from the Supreme Court.<sup>102</sup> The Court affirmed the order.<sup>103</sup>

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<sup>93</sup> The Prison Litigation Reform Act, 18 U.S.C. § 3626 (2006).

<sup>94</sup> *Id.* at 1917. The order, given on August 4, 2009, required that California come into conformance within two years of the issuance. *Three-Judge Panel and California Inmate Population Reduction*, CAL. DEP'T CORRECTIONS & REHABILITATION (May 23, 2011), <http://www.cdcr.ca.gov/News/docs/2011-05-23-Three-Judge-Panel-Background.pdf>. The order translated to an estimated population decrease of at least 33,000 inmates. *Id.*

<sup>95</sup> The PLRA is Congress's attempt to limit the number of claims that inmates bring with respect to prison conditions. *See generally* Philip White, Jr., Annotation, *Construction and Application of Prison Litigation Reform Act—Supreme Court Cases*, 51 A.L.R. FED. 2d 143 (2010) (exploring the United States Supreme Court's treatment of the PLRA).

<sup>96</sup> 18 U.S.C. § 3626(a)(3) (2006).

<sup>97</sup> *Id.* § 3626(a)(3)(A)(i).

<sup>98</sup> *Id.* § 3626(a)(3)(A)(ii).

<sup>99</sup> *Id.* § 3626(a)(3)(B); *see Brown v. Plata*, 131 S. Ct. 1910, 1922 (2011) (“The authority to order release of prisoners as a remedy to cure a systematic violation of the Eight Amendment is a power reserved to a three-judge district court, not a single-judge court.” (citing 18 U.S.C. § 3626(a))).

<sup>100</sup> 18 U.S.C. §§ 3626(a)(3)(E)(i)–(ii).

<sup>101</sup> *Plata*, 131 S. Ct. at 1931–37.

<sup>102</sup> Specifically, the issue presented to the Supreme Court was whether the three-judge court's prison reduction order satisfied the PLRA. *Id.* at 1922.

<sup>103</sup> *Id.* at 1947. The State argued that the order issued by the three-judge court did not require an actual release of inmates, *per se*. *See id.* at 1937–39. Specifically, the order directed California to reduce its overcapacity, and reserved for the State the choice of methodology. *Id.* Therefore, the State could have come into conformance via prison construction, out-of-state transfers, and by increasing prison medical staff. *Id.* Because these less restrictive measures existed, the State argued that the three-judge court did not meet the requirements of the PLRA. *Id.* The three-judge court and Supreme Court found, however, that there were, in fact, no meaningful plans to transfer inmates out of the State. *Id.* at 1937–38. Moreover, building new prisons was an unreasonable initiative, because California did not have adequate funding. *Id.*

California is now scrambling to comply with the Supreme Court ruling.<sup>104</sup> Although the population reduction order was motivated by a class of inmates who suffered from medical maltreatment, the Court made it clear that relief must also apply to “future class members” who may sustain injury as a result of these gross inadequacies, and therefore the State’s current proposals to bring the penitentiary system into compliance do not have to affect only those inmates with severe medical problems.<sup>105</sup> The Supreme Court did not expressly instruct California on the methodology it should use to achieve the population reduction.<sup>106</sup> However, California’s proposals should be scrutinized by similarly positioned States, policy makers, and the judiciary for their effectiveness and, the focus of this Note, their constitutionality.

## II. CALIFORNIA RESPONDS: PUBLIC SAFETY REALIGNMENT OF 2011

California has until the end of June 2013 to reduce its total prison population until the facilities operate at no more than 137.5% of design capacity.<sup>107</sup> The Supreme Court refrained from instructing California officials on how to best achieve this goal.<sup>108</sup> The Court did warn against the dangers of hastily releasing prisoners who still pose a threat to society, though it simultaneously recognized the likely need of introducing inmates back into society before the official conclusion of their sentencing terms.<sup>109</sup> Justice Kennedy acknowledged that the State could comply with the order by building new prisons, transferring inmates to out-of-state or county facilities, increasing its use of “good-time” credits, and routing “low-risk” and “technical

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at 1938. Staff expansion was not a viable option because the prisons could not attract personnel and the hostile environment was not conducive to employee retention. *Id.* In summation, the Court found that “[a] long history of failed remedial orders, together with substantial evidence of overcrowding’s deleterious effects on the provision of care” indicated that the State would be unable to bring its prisons into conformance without decreasing the inmate population under the weight of a judicial mandate. *Id.* at 1939.

<sup>104</sup> See, e.g., Jens Erik Gould, *As California Fights Prison Overcrowding, Some See a Golden Opportunity*, TIME, Sept. 29, 2011, <http://www.time.com/time/nation/article/0,8599,2094840,00.html>.

<sup>105</sup> *Plata*, 131 S. Ct. at 1940.

<sup>106</sup> *Information About California’s Prison Population Reduction Plans*, PRISON L. OFF. 1 (Oct. 14, 2011), <http://www.prisonlaw.com/pdfs/Population,Oct14,2011.pdf> [hereinafter PRISON L. OFF.].

<sup>107</sup> *Brown v. Plata*, 131 S. Ct. at 1923. See also PRISON L. OFF., *supra* note 106, at 1. Specifically, by November 28, 2011, California’s thirty-three adult prisons were to be operating at no greater than 167% of design capacity. By May 24, 2012, that percentage must have dropped to 155, and by November 26, 2012, the prisons could not be running at more than 147% capacity. *State Responds to Three-Judge Court’s Order Requiring a Reduction in Prison Crowding*, CDCR TODAY (June 7, 2011), <http://cdcrtoday.blogspot.com/2011/06/state-responds-to-three-judge-courts.html>.

<sup>108</sup> *Plata*, 131 S. Ct. at 1923.

<sup>109</sup> *Id.*

parole” offenders through local programs instead of State prisons.<sup>110</sup> California’s reduction plans, the most significant of which—Public Safety Realignment of 2011—commenced on October 1, 2011,<sup>111</sup> incorporate a revised parole system, an alternative custody program, and the reallocation of inmates that enter the penitentiary system after October 1, 2011.<sup>112</sup> Realignment, now in effect, hinges on a shift in power. The State is implementing the aforementioned changes largely by giving local jurisdictions authority over low-level offenders, juvenile offenders, and adult parolees.<sup>113</sup> Although the focus of this Note is on one of the programs designed for adult parolees—the Alternative Custody Program—because of their importance to California’s remedial efforts, the other measures warrant a summary glance before disposal.

At the outset, it is important to note that, contrary to public fears and inmates’ hopes, Realignment does not provide for early release or mid-sentence transfers of inmates to other institutions.<sup>114</sup> Under the plan, non-violent, non-serious, and non-sex offenders will be incarcerated in county jails instead of State prisons; however, the typical sentence length will remain unchanged.<sup>115</sup> Prior to Realignment, these classes of convicts would have been sent to State prison.<sup>116</sup> There are still certain types of offenders that will be required to serve out their incarceration in a State facility: sex offenders, and individuals found guilty of serious or violent felonies and certain non-serious and non-violent crimes as defined by State law,<sup>117</sup> or who have prior

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<sup>110</sup> *Id.* at 1923, 1929, 1937–39.

<sup>111</sup> Public Safety Realignment, formally titled Assembly Bill 109 (“AB 109”) and endorsed on April 4, 2011, by current California Governor, Edmund G. Brown, Jr., is California’s primary effort to address prison overcrowding. *2011 Public Safety Realignment (AB 109): DAPO Informational Overview*, CAL. DEP’T CORRECTIONS & REHABILITATION, <http://www.cdcr.ca.gov/Parole/parole-realignment.html> (last visited Oct. 14, 2012) [hereinafter *DAPO*].

<sup>112</sup> For more general information on each component of AB 109, Public Safety Realignment of 2011, see generally *Public Safety Realignment: The Cornerstone of California’s Solution to Reduce Overcrowding, Costs, and Recidivism*, CAL. DEP’T CORRECTIONS & REHABILITATION, <http://www.cdcr.ca.gov/realignment/index.html> (last visited Oct. 14, 2012).

<sup>113</sup> *Governor Brown Signs Legislation to Improve Public Safety and Empower Local Law Enforcement*, OFF. GOVERNOR EDMUND G. BROWN JR. (Apr. 5, 2011), <http://gov.ca.gov/news.php?id=16964>. Between 2011 and 2012, it is estimated that approximately twenty thousand prisoners will be placed under county authority. Barry Krisberg & Eleanor Taylor-Nicholson, *Criminal Justice: Realignment: A Bold New Era in California Corrections*, CHIEF JUSTICE EARL WARREN INST. ON L. & SOC. POL’Y, UNIV. OF CAL. BERKELEY L. SCH. 4 (Aug. 30, 2011), [http://www.law.berkeley.edu/files/REALIGNMENT\\_FINAL9.28.11.pdf](http://www.law.berkeley.edu/files/REALIGNMENT_FINAL9.28.11.pdf) (citing an estimation released by the California Department of Corrections and Rehabilitation).

<sup>114</sup> PRISON L. OFF., *supra* note 106, at 1.

<sup>115</sup> *Overview AB 109 & AB 117: Public Safety Realignment of 2011*, CAL. DEP’T CORRECTIONS & REHABILITATION, [http://www.cdcr.ca.gov/realignment/docs/AB\\_109-PowerPoint-Overview.pdf](http://www.cdcr.ca.gov/realignment/docs/AB_109-PowerPoint-Overview.pdf) (last visited Oct. 14, 2012) [hereinafter *Overview AB 109*].

<sup>116</sup> *See id.*

<sup>117</sup> *Id.* (including possessing horse meat, offering bribes to members of the Legislature, certain types of physical abuse, and attacking a law enforcement official).



convictions of such crimes.<sup>118</sup> The counties, although likely to be burdened with the sudden influx of new prisoners,<sup>119</sup> are not left without options for alleviation. For example, local jails retain the right to “contract back with the [s]tate” to transfer offenders within their jurisdiction to State facilities, and to place convicts in public community correctional facilities.<sup>120</sup> The counties are also charged with overseeing more newly released inmates on parole.<sup>121</sup>

With more responsibility accorded to the counties, State prison populations should drop, and California governor, Edmund G. Brown, hopes that there will be a concurrent decrease in recidivism rates and incarceration costs.<sup>122</sup> He relies on the notion that the counties are better positioned to deal effectively with inmate sentencing, incarceration, and rehabilitation.<sup>123</sup> Therefore, the State is giving counties discretion in their respective approaches and encouraging alternative methods to incarceration that other States have adopted to successfully decrease jail populations and

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<sup>118</sup> *Id.*

<sup>119</sup> To assert that counties are concerned about Realignment and the increase in local jail populations would be an understatement. Local jails are also battling overcapacity—it is not a problem that is unique to the State prisons. Currently, there are, at a minimum, twenty counties whose jails are subject to “court-ordered capacity limits,” and “local officials express fears [that] they will become targets for prisoner rights litigation.” Krisberg & Taylor-Nicholson, *supra* note 113, at 4; *see also* Nick Monacelli, *Sac Sheriff: State Realignment Plan Is ‘Asinine,’* NEWS10.NET (Sept. 9, 2011), <http://www.news10.net/news/local/story.aspx?storyid=153923> (highlighting Sacramento County Sheriff Scott Jones’s concerns over counties’ lack of preparation for Realignment, the short time frame for implementation, and lack of funds from the State); Rebecca Robinson, *The Great Uncrowding*, MONTEREY CNTY. WKLY. (Sept. 22, 2011), <http://www.montereycountyweekly.com/news/2011/sep/22/great-uncrowding/> (interviewing a chief deputy sheriff in Salinas, California who expressed concerns over the increase in jail violence as a result of the impending increase in inmate population).

<sup>120</sup> *Overview AB 109*, *supra* note 115.

<sup>121</sup> The non-violent and non-serious offenders that are *currently* housed in State prisons, when released, will be supervised by the counties instead of the State, although inmates with three strikes and certain prespecified, high-risk offenses will remain under State control. *Id.* For parole-related numerical data and estimations under AB 109, *see* Krisberg & Taylor-Nicholson, *supra* note 113, at 3–4.

<sup>122</sup> Marisa Lagos, *State’s Radical Prison Reform Plan Ready to Start*, S.F. CHRON. (Oct. 2, 2011), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/10/02/MNM71L9Q8Q.DTL>. Note that as of 2011, California was spending approximately \$45,006 per year to incarcerate a single inmate. CAL. DEP’T OF CORR. & REHAB., CORRECTIONS: YEAR AT A GLANCE 10 (2011) [hereinafter CAL. DEP’T OF CORR. & REHAB., GLANCE]. With Realignment, State finance analysts project that \$53 million will be saved in incarceration costs in 2011 alone, followed by \$125 million in 2012, and \$338 million in 2013. Tracey Kaplan, *State’s New Realignment Plan Will Let Prisoners Out Earlier*, SANTA CRUZ SENTINEL, Sept. 25, 2011, [http://www.santacruzsentinel.com/ci\\_18973356](http://www.santacruzsentinel.com/ci_18973356). A reduction in recidivism rates is understandably an important goal for Governor Brown, considering that recidivism increases both jail population and costs, and California currently has one of the steepest rates in the nation—67.5%. *See* Gould, *supra* note 104.

<sup>123</sup> *See* Lagos, *supra* note 122.

recidivism rates.<sup>124</sup> California, however, is not shifting the entire burden onto the county jails. It is promoting similar programs in the State system, and one of those programs—the Alternative Custody Program for primary child caregivers—is constitutionally problematic.

### III. SCRUTINIZING THE ALTERNATIVE CUSTODY PROGRAM

#### A. *The Nature of the Program*

The Alternative Custody Program, a “community-based program focused on re-entry and family reunification,” is returning qualifying inmates to their communities, where they are completing their sentences in a state-approved facility or residence.<sup>125</sup> During that time, they remain under the authority of the California Department of Corrections and Rehabilitation (CDCR),<sup>126</sup> report to parole agents, are required to wear GPS tracking devices, and must participate in treatment programs.<sup>127</sup>

In order to be eligible for the program, effective in 2011,<sup>128</sup> the inmate must satisfy a strict set of requirements. According to the text of the statute, the program is offered only to “female inmates, pregnant inmates, or inmates who were primary caregivers of dependent children immediately prior to incarceration.”<sup>129</sup> Specifically, in order to be considered a primary caregiver, the inmate must be the biological, step, adoptive, or foster parent of a child who is under eighteen years of age at the time the prisoner would be admitted to the program, and who shared a residence with the inmate “for the majority of the year preceding the inmate’s arrest.”<sup>130</sup> The inmate must also have a State prison sentence lasting for a specific period of time<sup>131</sup> and must

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<sup>124</sup> See Gould, *supra* note 104 (“The text of the realignment bill passed by California’s legislators suggests many possible alternative programs, including employment counseling, home detention with electronic monitoring, substance abuse programs, mental health treatment and mandatory community service.”). Note that other initiatives under AB 109 include GPS monitoring, medical parole, and alternative custody programs. See *DAP0*, *supra* note 111.

<sup>125</sup> *Fact Sheet: Alternative Custody Program*, CAL. DEP’T CORRECTIONS & REHABILITATION 1 (Sept. 12, 2011), [http://www.cdcr.ca.gov/Adult\\_Operations/FOPS/docs/ACP-Fact-Sheet-Final.pdf](http://www.cdcr.ca.gov/Adult_Operations/FOPS/docs/ACP-Fact-Sheet-Final.pdf) [hereinafter *Fact Sheet*].

<sup>126</sup> For more information on CDCR, see CAL. DEP’T CORRECTIONS & REHABILITATION, <http://www.cdcr.ca.gov/> (last visited Oct. 14, 2012).

<sup>127</sup> *Fact Sheet*, *supra* note 125, at 1 (citing CDCR’s continued authority over the inmates and the requirement that program participants report to a Parole Agent). Regarding inmate tracking, “[a]n alternative custody program shall include the use of electronic monitoring, global positioning system devices, or other supervising devices for the purpose of helping to verify a participant’s compliance with the rules.” CAL. PENAL CODE § 1170.05(e) (West Supp. 2012). Treatment programs are intended to help the inmates transition back into their communities upon release. *Id.* § 1170.05(f)(1), (2); see also *id.* § 1170.05(j).

<sup>128</sup> *Fact Sheet*, *supra* note 125, at 1.

<sup>129</sup> PENAL § 1170.05(a).

<sup>130</sup> *Id.* §§ 1170.05(p)(1)–(4).

<sup>131</sup> *Id.* § 1170.05(c).

apply for the program on a voluntary basis.<sup>132</sup> It is not offered to inmates convicted currently or previously of a violent or serious felony,<sup>133</sup> with sex offender status,<sup>134</sup> deemed—by certain department standards—to be high-risk,<sup>135</sup> or guilty of an escape within the past ten years.<sup>136</sup> Inmates that are eligible and accepted into the program will be placed in a transitional care facility, a residential drug or treatment program, or a residential home,<sup>137</sup> and they may be sent back to prison “with or without cause.”<sup>138</sup>

Although the Alternative Custody Program, in the statutory text, does not expressly state that it is available to male inmates, it is logical to infer from the wording that men may qualify: “female inmates, pregnant inmates, *or inmates who were primary caregivers* of dependent children.”<sup>139</sup> The last clause, emphasized here, appears to be role-based and not gender-based, with the only relevant factor being whether the inmate was primarily responsible for the care of the child. However, the California Department of Corrections and Rehabilitation—the overseer of the Alternative Custody Program—announced on September 12, 2011, that “the program will initially be offered to qualifying female inmates. Participation may be offered at a later date to male inmates, at the discretion of the Secretary of CDCR.”<sup>140</sup> CDCR further stated, “[it] estimates 45 percent of its female inmates will be potentially eligible for [the Alternative Custody Program].”<sup>141</sup> In addition, CDCR spokeswoman, Dana Toyama, told news reporters that male inmates may eventually be able to participate in the program, and cited money and overcrowding as reasons.<sup>142</sup> But is the Alternative Custody Program constitutional?

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<sup>132</sup> *Id.* § 1170.05(a).

<sup>133</sup> *Id.* §§ 1170.05(d)(1)–(2).

<sup>134</sup> *Id.* § 1170.05(d)(3).

<sup>135</sup> *Id.* § 1170.05(d)(4).

<sup>136</sup> *Id.* § 1170.05(d)(5).

<sup>137</sup> *Id.* § 1170.05(b). Note that a residential home refers to “a structure in an area that is zoned for residential habitation, and can be located and identified by a street number and street name.” CAL. CODE REGS. tit. 15, § 3078(c) (2011). A residential drug or treatment home is “an approved program located in a structure in an area that is zoned for residential habitation, that can be located and identified by a street number and street name, and which provides substance abuse or other treatment.” *Id.* § 3078(e). A transitional care facility is “an approved facility located in a structure in an area that is zoned for residential habitation, and can be located and identified by a street number and street name and which assists in the transition from a custody or treatment environment to an independent living environment.” *Id.* § 3078(d). Regardless of where the inmate is placed, she cannot leave the premises except during certain hours, and she will always be subject to police search. CAL. PENAL CODE §§ 1170.05(g)(1)–(2).

<sup>138</sup> CAL. PENAL CODE § 1170.05(m).

<sup>139</sup> *Id.* § 1170.05(a) (emphasis added).

<sup>140</sup> *Fact Sheet*, *supra* note 125, at 1.

<sup>141</sup> *Id.* at 3.

<sup>142</sup> *California Weighs Program to Release Thousands of Female Inmates*, FOX NEWS (Sept. 13, 2011), <http://www.foxnews.com/us/2011/09/13/california-weighs-program-to-release-thousands-female-inmates/> [hereinafter *California Weighs*].

*B. The Alternative Custody Program Is Unconstitutional*

The Fourteenth Amendment of the United States Constitution states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>143</sup>

Classifications drawn on the basis of race are “inherently suspect,”<sup>144</sup> even in the prison context.<sup>145</sup> Such discrimination warrants a strict scrutiny analysis,<sup>146</sup> and may survive judicial review only if the government can prove that the classification is essential to the accomplishment of a “compelling governmental interest.”<sup>147</sup> When the government discriminates on the basis of gender, however, a lower level of scrutiny—“intermediate scrutiny”—is applied, because courts have held that sex-based classifications are less suspect for improper and invidious intent.<sup>148</sup> Summarily, the government’s gender-based categorization must have an “exceedingly persuasive justification,”<sup>149</sup> and in order to prove the existence of such, the government must show that the classification “serve[s] [an] important governmental objective[] and . . . [is] substantially related to the achievement of [that] objective[.]”<sup>150</sup>

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<sup>143</sup> U.S. CONST. amend. XIV, § 1.

<sup>144</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (“Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”); *see also* *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995) (“[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”).

<sup>145</sup> *See, e.g.,* *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966), *aff’d*, 390 U.S. 333 (1968) (holding that racial segregation in prisons and jails violated the Fourteenth Amendment).

<sup>146</sup> *See, e.g.,* *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984) (“[Racial] classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be ‘necessary . . . to the accomplishment’ of their legitimate purpose.” (quoting *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964))).

<sup>147</sup> *Id.* at 432.

<sup>148</sup> In *Craig v. Boren*, 429 U.S. 190 (1976), the Supreme Court verbalized what has become known as the intermediate scrutiny test. Justice Brennan held that intermediate scrutiny should be applied to gender-based classifications, stating, “[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” *Id.* at 197.

<sup>149</sup> *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)).

<sup>150</sup> *Craig*, 429 U.S. at 197.

The Alternative Custody Program, as CDCR<sup>151</sup> is currently implementing it, should be subject to intermediate scrutiny review, and it should not pass. Although its statutory text establishes a non-gender-specific classification—eligibility will be extended to “inmates who were primary caregivers of dependent children immediately prior to incarceration”<sup>152</sup>—as noted earlier, CDCR recently expressed its intent to allow only female inmates to apply to the program now and in the immediately foreseeable future.<sup>153</sup> In order for a government action to be challenged on equal protection grounds, it does not have to be gender discriminatory on its face.<sup>154</sup> In other words, “the law in its very terms [does not have to] draw[ ] a distinction among people based on gender.”<sup>155</sup> It simply must have a discriminatory impact on one gender fueled by an invidious purpose.<sup>156</sup> It is clear that the Alternative Custody Program’s eligibility requirements do not discriminate against male inmates by their statutory terms. However, there is strong evidence of invidious intent, as demonstrated by the program’s discriminatory enactment and impact: CDCR is currently offering the program only to female inmates and therefore allowing only female inmates to serve the rest of their sentences at home.<sup>157</sup>

In order to avoid the more stringent intermediate level of judicial scrutiny, CDCR may refute the showing of invidious intent by arguing that the non-gender-specific

<sup>151</sup> It is important, for procedural purposes, to note that the CDCR is a State agency and therefore is subject to the requirements of the Fourteenth Amendment. For information on CDCR, see *About CDCR*, CAL. DEP’T CORRECTIONS & REHABILITATION, [http://www.cdcr.ca.gov/About\\_CDCR/](http://www.cdcr.ca.gov/About_CDCR/) (last visited Oct. 14, 2012).

<sup>152</sup> CAL. PENAL CODE § 1170.05(a) (West Supp. 2012).

<sup>153</sup> See *Fact Sheet*, *supra* note 125, at 1; see also *California Weighs*, *supra* note 142.

<sup>154</sup> For an example of a gender-specific classification that disadvantaged men on its face, see *Craig v. Boren*, 429 U.S. 190 (1976) (successful equal protection challenge to a State law that imposed a lower drinking age for women than for men). For an example of a gender-specific classification that disadvantaged women on its face, see *United States v. Virginia*, 518 U.S. 515 (1996) (deciding that Virginia Military Institute’s categorical exclusion of women violated the equal protection clause).

<sup>155</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 757 (Vicki Been et al. eds., 3d ed. 2006).

<sup>156</sup> *Personal Adm’r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (“When a statute gender-neutral on its face is challenged on the ground that its effects [on a gender] are disproportionately adverse, a two-fold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. In this second inquiry, impact provides an important starting point, but purposeful discrimination is the condition that offends the Constitution.” (citations omitted) (internal quotation marks omitted)); CHEMERINSKY, *supra* note 155, at 757 (“[I]f a law is facially gender neutral, proving a gender classification requires demonstrating that there is both a discriminatory impact to the law and a discriminatory purpose behind it.”).

<sup>157</sup> Note that the inmates may serve the remainder of their sentences at a residential home, at a residential drug or treatment program, or at a transitional care facility. See CAL. PENAL CODE § 1170.05(b); *supra* note 137 and accompanying text.

wording in the statute is indicative of its gender-neutral purpose. If the State has no intent to advantage women over men, then a court will analyze the constitutionality of the program under a more favorable, lenient standard. That standard, referred to as rational basis, would operate on the presumption that the program is constitutional, and the program will be upheld by a court as long as CDCR can assert that its implementation is “rationally related to a legitimate state interest.”<sup>158</sup> Convincing a court of the absence of invidious purpose would be an extremely difficult task for CDCR, however, given the fact that CDCR made express statements to the contrary—that CDCR intends to offer the program only to female inmates at this time.<sup>159</sup>

With discriminatory enactment, impact, and intent established, CDCR, in order to survive intermediate scrutiny review, would have to prove that its implementation of the Alternative Custody Program—with eligibility extended only to women—is substantially related to an important governmental interest.<sup>160</sup> Its reasoning for the unequal treatment must be “genuine,” and not simply a *plausible* explanation.<sup>161</sup> Importantly, CDCR cannot “rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”<sup>162</sup>

CDCR has not specifically stated its motivations for offering the program only to women now and in the immediate future. It did suggest that if the program is extended to men in the future, it would be for prison cost and capacity reasons.<sup>163</sup> CDCR has expressed, however, its rationale for the program in general, and, because it is only offering it to female inmates now, it may be assumed that its reasons for the program and its reasons for limiting eligibility to women are synonymous.

One factor motivating the Alternative Custody Program is that the program will help California come into compliance with the Supreme Court order to reduce prison overcrowding.<sup>164</sup> Indeed, that is an important government interest. The State is

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<sup>158</sup> See *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn . . . is rationally related to a legitimate state interest.”).

<sup>159</sup> *California Weighs*, *supra* note 142; see also *Fact Sheet*, *supra* note 125.

<sup>160</sup> See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

<sup>161</sup> See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (“The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.”).

<sup>162</sup> *Id.*

<sup>163</sup> See *Fact Sheet*, *supra* note 125, at 1 (“[T]he program will initially be offered to qualifying female inmates. Participation may be offered at a later date to male inmates, at the discretion of the Secretary of CDCR.”); *California Weighs*, *supra* note 142 and accompanying text.

<sup>164</sup> The legislation was originally signed by former California Governor Arnold Schwarzenegger—who was also grappling with the system’s crowding problem—and was first offered just months after the Supreme Court order. See *Fact Sheet*, *supra* note 125, at 1; see also MILENA NELSON, ASSEMB. COMM. ON PUB. SAFETY, S.B. 1266 BILL ANALYSIS, at 11 (Cal.

compelled to comply with the mandate and is not at liberty to continue offending the Constitution by subjecting inmates to Eighth Amendment violations. The critical inquiry, then, is not whether the State's objective is important, but whether the discriminatory enactment is substantially related to the attainment of that objective.<sup>165</sup> An estimated 45% of female inmates could be eligible for the Alternative Custody Program, but CDCR estimates that the percentage actually admitted is likely to be significantly lower.<sup>166</sup> Approximately 94% of California's inmates in the State prison system are male.<sup>167</sup> Releasing offenders that are mothers as opposed to those that are fathers bears no relation to the interest of reducing total inmate population. A classification based on motherhood, in effect, is an illogical means of achieving a reduction in capacity given the fact that California prisons are housing, by an overwhelming majority, male convicts.<sup>168</sup> The State has the burden of justifying the gender classification,<sup>169</sup> and, based on the reasoning above, it likely will not meet that burden given the lack of the requisite relatedness. Therefore, a reduction in prison overcrowding, though an important objective, is a constitutionally insufficient reason for offering the program only to female inmates.

The California Department of Corrections and Rehabilitation also hopes that the Alternative Custody Program will halt the "cycle of incarceration in families"<sup>170</sup> and aid in the successful rehabilitation of inmates.<sup>171</sup> CDCR spokeswoman, Dana Toyama, stated in an interview:

Time and time again, family interaction is one of the indicators of a rehabilitation success . . . . [CDCR] want[s] to reunite family, incarcerated mothers with their families. And . . . [CDCR has]

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2010), [http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb\\_1251-1300/sb\\_1266\\_cfa\\_20100621\\_101257\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_1251-1300/sb_1266_cfa_20100621_101257_asm_comm.html) [hereinafter S.B. 1266 BILL ANALYSIS] ("The creation of an alternative custody program would help to alleviate the overcrowding crisis in the state prison, by allowing non-violent low-risk inmates [to] remain at home with their families.").

<sup>165</sup> This is in keeping with the intermediate scrutiny test. *See supra* notes 148–58 and accompanying text.

<sup>166</sup> *California Weighs*, *supra* note 142.

<sup>167</sup> *Id.*

<sup>168</sup> *See* Jack Dolan, *Prison Officials Are Set to Let Some Female Inmates Out Early*, L.A. TIMES, Sept. 13, 2011, <http://articles.latimes.com/2011/sep/13/local/la-me-prison-home-20110913> ("If a significant number of the state's roughly 150,000 incarcerated men could qualify for the program as 'primary caregivers' for their children, early release would go a long way toward easing overcrowding . . .").

<sup>169</sup> *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The burden of justification is demanding and it rests entirely on the State.").

<sup>170</sup> *California Weighs*, *supra* note 142.

<sup>171</sup> Interview by Maureen Cavanaugh with Dana Toyama, Spokeswoman, Cal. Dep't of Corr. & Rehab., *Moms in California Prisons May Be Eligible for Early Release*, KPBS.ORG (Sept. 14, 2011), <http://www.kpbs.org/news/2011/sep/14/mothers-calif-prisons-may-be-eligible-community-re/> [hereinafter *Moms in California*].

seen time and time again that family interaction is one of the biggest indicators of an inmate's success. And that's what [CDCR is] hoping to obtain implementing this program. . . . Hopefully, [CDCR] see[s] a reduced impact on inner [sic] generational incarceration . . . .<sup>172</sup>

California's Secretary of State Prisons, Matthew Cate, echoed Toyama's view,<sup>173</sup> and Senator Liu,<sup>174</sup> author of the bill underlying the Alternative Custody Program, stated "[c]hildren of inmates are much more likely than their peers to become incarcerated. . . . Alternative custody will allow families to maintain relationships, and mothers will be less likely to re-offend."<sup>175</sup> Considering California's battle with over-capacitated prisons and the Supreme Court's mandate for a reduction in the prison population, successful rehabilitation and a decline in recidivism are arguably important government interests. The State maintains that family interaction reduces the likelihood of repeat offenses and intergenerational incarceration, but it does not argue that the family interaction must be limited to mother-child exchanges in order to be effective.<sup>176</sup> If a male inmate who would otherwise meet the requirements of a "primary caregiver"<sup>177</sup> partakes in the family dynamics and social setting to the same extent as a similarly positioned female inmate, then drawing the eligibility requirements along gender lines does not appear to be sufficiently tailored to the stated interests. The State would need to show that male primary caregivers, once released back into their homes, would not engage in family interactions, or that such activity would have no bearing on their decision to reoffend. Absent such a finding, this gender-based rationale fails the relationship test required by intermediate scrutiny, and thus does not withstand constitutional analysis.

The State estimates that the program will save it money on incarceration costs.<sup>178</sup> When an inmate is placed in the Alternative Custody Program, the inmate's housing

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<sup>172</sup> *Id.*

<sup>173</sup> Dolan, *supra* note 168 ("The program is 'a step in breaking the intergenerational cycle of incarceration,' state prisons Secretary Matthew Cate said, arguing that 'family involvement is one of the biggest indicators of an inmate's rehabilitation.'").

<sup>174</sup> The author of S.B. 1266, the bill signed by Governor Schwarzenegger and what is now § 1170.05 of the California Penal Code, is Carol Liu, California State Senator from the 21st District. *See generally* S.B. 1266 BILL ANALYSIS, *supra* note 164 (analysis of the Bill as prepared by legal counsel for the Assembly Committee on Public Safety). For more information on Senator Liu, see her official website, SENATOR CAROL LIU—21ST DISTRICT, <http://sd21.senate.ca.gov/> (last visited Oct. 14, 2012).

<sup>175</sup> S.B. 1266 BILL ANALYSIS, *supra* note 164, at 7.

<sup>176</sup> *See* Dolan, *supra* note 168; *Moms in California*, *supra* note 171.

<sup>177</sup> For the "primary caregiver" statutory requirements, *see* CAL. PENAL CODE §§ 1170.05 (p)(1)–(4) (West Supp. 2012); *supra* note 130 and accompanying text.

<sup>178</sup> The State does not finance the Alternative Custody Program, and thus it estimates that it will save \$6 million in 2012. *Fact Sheet*, *supra* note 125, at 2.



expenses are covered by participating non-profit and community organizations.<sup>179</sup> The State also ceases to pay for the inmate's food and transportation.<sup>180</sup> California spends approximately \$45,000 each year to incarcerate one inmate,<sup>181</sup> and it is the frontrunner among the States in correctional spending.<sup>182</sup> Therefore, it is no wonder, and arguably an important governmental goal, for the State to try to reduce its penal expenses and place tax dollars in competing venues. However, in no way can the program's limitation to women be substantially related to that end. The State would need to show that the gender distinction is necessary to the achievement of the cost reduction, but such an argument would be counterintuitive and unlikely to succeed. With most of the State's inmates being male,<sup>183</sup> it follows that most of the incarceration dollars are spent on males, and thus the greatest savings would be incurred by placing them in cheaper programs such as Alternative Custody. To argue that it is necessary, for cost saving purposes, to limit eligibility to females runs contrary to this simple logic, and thus a court would be unlikely to find that the gender discrimination, under this rationale, survives intermediate scrutiny review.

A potential reason for the classification is the notion that it is best for the children if the mother returns home. According to the author of the senate bill underlying the Alternative Custody Program:

Incarcerated women are not the only individuals negatively impacted by incarceration; families and communities have been devastated by women's imprisonment. . . . Most of California's incarcerated mothers are the primary caregivers of dependent children and hope to return home to their children. While the vast majority of children of incarcerated men continue to live with their mothers, children of incarcerated women are more likely to end up living with other relatives or in foster care.<sup>184</sup>

Child welfare is, at the very minimum, an important government concern.<sup>185</sup> However, the fact that the children of incarcerated mothers, compared to those of

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<sup>179</sup> *Id.* ("When [the Alternative Custody Program] was enacted into law, several non-profit and community organizations offered their programs free of charge to [Alternative Custody Program] participants. Under [the Alternative Custody Program], inmates may live in approved residences, but the state is not responsible for their housing costs.").

<sup>180</sup> *Id.*

<sup>181</sup> CAL. DEP'T OF CORR. & REHAB., GLANCE, *supra* note 122, at 10.

<sup>182</sup> *One in 100*, *supra* note 3, at 11.

<sup>183</sup> *California Weighs*, *supra* note 142.

<sup>184</sup> S.B. 1266 BILL ANALYSIS, *supra* note 164, at 8 (citing M. ANNE POWELL & CLARE NOLAN, CAL. RESEARCH BUREAU, CALIFORNIA STATE PRISONERS WITH CHILDREN: FINDINGS FROM THE 1997 SURVEY OF INMATES IN STATE AND FEDERAL CORRECTIONAL FACILITIES (2003)).

<sup>185</sup> *See* *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The State, of course, has a duty of the highest order to protect the interests of minor children. . . . The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause.").

imprisoned fathers, are more likely to be placed in the care of an entity other than his or her parent does not seem to suggest that only mothers should be eligible for the program. At this time, the program's terms do not include a set number of "slots" available for inmates—a quota—where inmates would have to compete with each other for enrollment.<sup>186</sup> If that were the case, then perhaps the State could endeavor to argue that because children whose mothers are in prison are more likely to live with an individual other than their parent and the goal is to keep children with their parents, the choice to offer the set number of enrollment spaces to mothers is substantially related to the achievement of that goal. The more mothers that the State places back at home, the more children will be placed in the care of a parent.<sup>187</sup> However, as stated above, the program does not have a maximum enrollment.<sup>188</sup>

Moreover, the text of the legislation requires that the dependent child have lived with the inmate for the "majority of the year preceding the inmate's arrest."<sup>189</sup> The State may be concerned that by releasing a father (who fits the statutory definition of "primary caregiver") there will be little impact on the child based on the statistical likelihood that the child, during the father's incarceration, continued to be cared for by the mother. In that situation, further evidentiary findings would be required for a showing that the classification is substantially related to child welfare. This would be a difficult burden, considering that there may be benefits to the child in having two parents in the home as opposed to one. For example, inmates are allowed to engage in occupations once they are in the program.<sup>190</sup> If the father rejoins the household and contributes to the family income, then that would be a foreseeable benefit to the child.<sup>191</sup> Additionally, the father, assuming he meets the requirements of being a "primary caregiver," may be able to meaningfully contribute to the child's upbringing and provide other social benefits. Therefore, limiting eligibility to female inmates alone does not appear to be substantially related to the furtherance of the child's welfare.

Another potential reason for the classification is the fear that releasing fathers—male inmates—will threaten society's safety.<sup>192</sup> Senator Liu, author of the program's legislation, stated:

While over half of the men in prison were incarcerated for violent crimes, just 30% of women were convicted of violence. In fact, female inmates are more likely to be victims of violent crimes

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<sup>186</sup> See CAL. PENAL CODE § 1170.05 (West Supp. 2012).

<sup>187</sup> See, e.g., S.B. 1266 BILL ANALYSIS, *supra* note 164, at 8.

<sup>188</sup> See CAL. PENAL CODE § 1170.05.

<sup>189</sup> *Id.* § 1170.05(p)(3).

<sup>190</sup> *Id.* § 1170.05(j) ("[P]rogram participants [may] seek and retain employment in the community . . .").

<sup>191</sup> Adam Thomas & Isabel Sawhill, *For Love and Money? The Impact of Family Structure on Family Income*, 15 FUTURE CHILD 57, 57–58 (2005). See generally *id.* at 57–69 (analyzing the benefits that children gain by living with two parents in a single environment).

<sup>192</sup> See, e.g., S.B. 1266 BILL ANALYSIS, *supra* note 164, at 7.

than to be the perpetrators. . . . Given this, it is not surprising that over two-thirds of women are classified as low risk . . . .<sup>193</sup>

Public safety is undoubtedly an important government objective, and the Supreme Court advised California to comply with the population reduction order in a manner that does not undermine public safety.<sup>194</sup> However, merely proffering statistics concerning the violent nature of the crimes committed by women as compared to men, and the resulting levels of risk each gender poses, will not satisfy intermediate scrutiny. There is a gender-neutral alternative to the discriminatory enactment, and the text of the program's statutory basis already employs it. The statute's requirements for eligibility maintain that the only inmates that can apply for the program are those with records of non-violent and non-serious crimes.<sup>195</sup> They cannot be sex offenders.<sup>196</sup> They must be low-risk, as analyzed under CDCR standards,<sup>197</sup> and they cannot have any escapes on their record during the past ten years.<sup>198</sup> If the concern is public safety, and women are being treated as low risks to society based on the nature of their crimes, then a man who qualifies, under this set of standards—which focuses on low-risk, non-felonious convictions—and thus poses the same level of risk, is, for purposes of public safety, no different than the female offender. These eligibility requirements should alleviate the worry of a threat to public safety because once the filtering process is complete, the eligible men and women presumably would be identical in terms of the severity of their criminal history and the risk that they pose to the public. Therefore, continuing to draw a line on the basis of gender and prohibiting men from applying to the program, all under the guise of public safety, is unfounded and fails to meet the requirements of intermediate scrutiny. The sex-based classification is not necessary to preserving public safety, as the text of the statute provides gender-neutral requirements to ensure that only low-risk inmates, whether men or women, are admitted into the program.

In summation, each proffered and potential reason that the State has or may have for implementing the Alternative Custody Program in a discriminatory manner fails to satisfy intermediate scrutiny review. Although each goal that the State hopes to obtain through the program is valid and important, the discrimination against male inmates is not substantially related to the furtherance of any of those objectives. Indeed, in some instances, the gender classification appears to impede the achievement of the goal.

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<sup>193</sup> *Id.* at 7–8.

<sup>194</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1944 (2011).

<sup>195</sup> CAL. PENAL CODE §§ 1170.05(d)(1)–(2).

<sup>196</sup> *Id.* § 1170.05 (d)(3).

<sup>197</sup> *Id.* § 1170.05 (d)(4).

<sup>198</sup> *Id.* § 1170.05 (d)(5).

#### IV. BRINGING THE ALTERNATIVE CUSTODY PROGRAM INTO CONSTITUTIONAL COMPLIANCE

The Alternative Custody Program is still in its infant stages, with its implementation beginning in 2011.<sup>199</sup> The text of the statute itself, as discussed in Part III, does not pose an equal protection problem. It is gender-neutral on its face and does not discriminate against male inmates.<sup>200</sup> Therefore, a redrafting of the legislation is not necessary. It is CDCR's intended enactment of the program that runs afoul of the Constitution. The constitutional flaws with the implementation and failure to pass intermediate scrutiny can be remedied with a change in the program's execution. The CDCR should adhere to the clear text of the statute and extend eligibility to both male and female inmates who meet the statute's specified requirements.

The inmate's sex should be irrelevant to CDCR's evaluation of a potential enrollee. The statute lists factors that differentiate between the inmates on bases other than gender. The discerning factors, such as prior criminal history,<sup>201</sup> presence of a minor in the household,<sup>202</sup> and degree of threat posed to society,<sup>203</sup> are constitutionally neutral criteria that would pass judicial review. In the absence of gender discriminatory intent, as noted in Part III, the program would be subject to rational basis scrutiny.<sup>204</sup> To survive attack under rational basis, the State would merely have to prove that the criteria that it uses to determine who is admitted into the program, which would not include gender considerations, are reasonably related to the achievement of any legitimate government objective.<sup>205</sup>

Under rational basis, the State may choose<sup>206</sup> to argue that it is seeking to reduce prison overcrowding while minimizing the threat to society and maximizing the benefit. The argument may be framed as follows: the Alternative Custody Program allows the State to remove inmates from its overpopulated—and therefore constitutionally

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<sup>199</sup> *Fact Sheet*, *supra* note 125, at 1.

<sup>200</sup> *See* CAL. PENAL CODE § 1170.05(a), *supra* note 139 and accompanying text.

<sup>201</sup> *See* CAL. PENAL CODE §§ 1170.05(d)(1)–(3), (5).

<sup>202</sup> *Id.* §§ 1170.05(a), (p)(1)–(4).

<sup>203</sup> *Id.* § 1170.05(d)(4).

<sup>204</sup> *See supra* note 158 and accompanying text.

<sup>205</sup> CHEMERINSKY, *supra* note 155, at 678 (“The Supreme Court generally has been extremely deferential to the government when applying the rational basis test. [T]he Court often has said that a law should be upheld if it is possible to conceive *any* legitimate purpose for the law, *even if it was not the government's actual purpose*. The result is that it is very rare for the Supreme Court to find that a law fails the rational basis test.” (emphasis added)). *See also* *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

<sup>206</sup> Recall that under the rational basis test, the State may argue *any conceivable* purpose for its actions, as long as it is legitimate. The definition of legitimacy is broad. Legitimate government purposes include “[p]ublic safety, public health, and public morals . . . but they are not the only ones. Virtually any goal that is not forbidden by the Constitution will be deemed sufficient to meet the rational basis test.” CHEMERINSKY, *supra* note 155, at 681.

troublesome—prisons and, while maintaining control over the inmates' whereabouts, place them under watch in the community. Introducing inmates back into society while they are still serving out their sentences should and does raise concerns over the potential impact on public safety.<sup>207</sup> Indeed, those concerns are accounted for in the program's restrictions on eligibility.<sup>208</sup> By discriminating against inmates on the basis of prior convictions and allowing only those with non-violent and other low-severity crimes to enroll, that threat to society is reduced and controlled. Therefore, such restrictions are rationally related to the preservation of public safety.

The primary caregiver requirement allows the State to ensure that children are reunited with their parents, potentially provides for additional household income, supervision, and stability, and lessens the need for alternative child services, such as foster care.<sup>209</sup> By having the opportunity to seek employment during their enrollment in the program, the inmates may make meaningful contributions to society and, as productive citizens, be less likely to offend again in the future.<sup>210</sup> With inmates now residing in their communities instead of behind bars, the State—which is not funding the program—will save money on prison costs and be able to allocate those funds to other societal needs, thereby creating a benefit to society.<sup>211</sup> Summarily, the program's eligibility requirements as outlined by the statute, absent any effort by CDCR to add gender to those criteria, are rationally and reasonably related to legitimate purposes. Therefore, if the Alternative Custody Program is implemented according to its statutory terms and CDCR extends eligibility *now* to males as well as to females, then from this point on, the program will pass constitutional muster, and the equal protection infringement will cease to exist.

#### CONCLUSION

Prison overcrowding is not a problem that is unique to California.<sup>212</sup> California is simply a strong case in point, and its particularly heinous penal environment captured the attention of the Supreme Court. The Court, in 2011, found that these gruesome conditions, specifically the lack of adequate medical care, were the result of gross prison over-crowding.<sup>213</sup> Other States are not immune to similar holdings;<sup>214</sup>

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<sup>207</sup> Note that the Supreme Court cautioned California against putting society at peril when carrying out the prison population reduction order. *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011).

<sup>208</sup> CAL. PENAL CODE § 1170.05(d).

<sup>209</sup> *See, e.g.*, S.B. 1266 BILL ANALYSIS, *supra* note 164.

<sup>210</sup> *Id.* *See also supra* note 190 and accompanying text.

<sup>211</sup> *See supra* notes 179–83 and accompanying text.

<sup>212</sup> *See Doyle, supra* note 13 and accompanying text.

<sup>213</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011).

<sup>214</sup> *See Doyle, supra* note 13 and accompanying text; Brief for the States of Louisiana et al., *supra* note 13 and accompanying text.

thus the nation is anxiously observing California as it scrambles to come into compliance with the Court order. Although many initiatives are now in place, only one has been the focus of this Note: the Alternative Custody Program.

The program's statutory underpinnings are constitutionally sound.<sup>215</sup> It draws the parameters of eligibility on benign, non-immutable factors such as whether the inmate has a dependent child at home,<sup>216</sup> the nature of the inmate's criminal record,<sup>217</sup> and the level of threat that the convict poses to society.<sup>218</sup> It does not discriminate on the basis of gender.<sup>219</sup> The CDCR, the State agency charged with the program's implementation, is, however, removing the program from the confines of the Constitution. CDCR is taking a statute with non-gender-specific classifications and purposefully executing it in a gender-discriminatory manner.<sup>220</sup> Intermediate scrutiny, the level of judicial review appropriate for gender-based equal protection inquiries,<sup>221</sup> requires the State to prove that the sex-based classification is "exceedingly . . . justifi[ed]";<sup>222</sup> that it is "substantially related" to an "important governmental objective[.]"<sup>223</sup> As this Note has explained, California, through CDCR, cannot make such a showing. The government's motivations driving the program do not bear a substantial relationship to the requirement that only females may be eligible for Alternative Custody Program. At times, that criterion even runs contrary to the government's objectives. Therefore, the Alternative Custody Program, as currently enacted by CDCR, does not withstand intermediate scrutiny. It is unconstitutional on equal protection grounds.

This is not to say that the program is hopelessly condemned. The statutory text underlying the initiative is acceptable. It does not discriminate on the basis of gender. The factors that frame inmate eligibility survive the applicable rational basis review. The discerning criteria, such as inmate criminal history and presence of a dependent child, are rationally, reasonably related to a legitimate government interest, presumably the desire to reduce prison overcrowding while minimizing the threat to society and maximizing the benefit. Therefore, the resolution is relatively simple. The CDCR should restrict itself to the eligibility requirements outlined in the statute. There is a textual presumption that the program is available to both men and women,<sup>224</sup> and indeed, the Constitution requires it.

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<sup>215</sup> See *supra* notes 151–57 and accompanying text.

<sup>216</sup> CAL. PENAL CODE §§ 1170.05(a), (p)(1)–(4) (West Supp. 2012).

<sup>217</sup> *Id.* §§ 1170.05(d)(1)–(3), (5).

<sup>218</sup> *Id.* § 1170.05(d)(4).

<sup>219</sup> See *supra* notes 156–57 and accompanying text.

<sup>220</sup> See *supra* Part III.

<sup>221</sup> See *Craig v. Boren*, 429 U.S. 190, 197 (1976); see also *supra* note 148 and accompanying text.

<sup>222</sup> See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

<sup>223</sup> See *Craig*, 429 U.S. at 197.

<sup>224</sup> See CAL. PENAL CODE § 1170.05(a) (West Supp. 2012).

The Alternative Custody Program, with proper (i.e., gender-neutral enactment) is arguably a socially advantageous approach to reducing prison overcrowding. Instead of building new prisons, which would require more time and money, it focuses on distributing benefits to all involved. Prisons will decrease their populations and this should, when coupled with other Realignment initiatives, help California reduce prison overcapacity and come into compliance with the Supreme Court order. With less money spent on incarceration, the State should have more tax dollars to allocate to other social needs, benefitting the California community. And, quite importantly, the program will benefit the inmates themselves, as they are provided with a structured and carefully monitored opportunity to reintegrate into their families and communities, and rehabilitate themselves with local assistance.