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Litigation over Prison Medical Services

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Introduction

On August 4, 2009, a specially constituted panel of three federal judges issued a remarkable ruling requiring the California Department of Corrections and Rehabilitation ("CDCR") to release approximately forty thousand inmates from the state prison system.\(^1\) The inmate release order represents the culmination of nearly two decades of litigation in two separate suits. One suit, originally called Coleman v. Wilson, challenged the constitutionality of the mental health care services provided in California’s prisons.\(^2\) Another suit, Plata v. Schwarzenegger, challenged the constitutionality of the medical care services (apart from mental health care) in California’s prisons.\(^3\)

The history of these cases reflects a general problem in California’s approach to policymaking: a tendency to adopt emotionally appealing initiatives without the willingness to bear the costs and responsibilities. The specific problem has been the adoption of politically advantageous tough-on-crime policies without accepting the ultimate consequences of these policies. The three-judge panel’s inmate release order represents a condemnation of this sort of short-term thinking. More generally, it reflects a deep distrust of the capacity of the State’s elected representatives and prison officials to do the right thing on prison reform.

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Given the widespread ramifications of prison litigation for the State, the California Correctional Crisis Conference sponsored by U.C. Hastings in 2009 invited four leading experts to discuss the medical services suits. The participants included: Donald Specter, the Director of the Prison Law Office; Clark Kelso, the Federal Receiver and head of the California Prison Health Care Services; Dr. Lori Kohler, a Professor at UCSF and Director of the Correctional Medicine Consultation Network; and Joyce Hayhoe, Assistant Secretary of the Office of Legislation at the CDCR. The panel discussion occurred a little more than a month after the three-judge panel issued its tentative order to release prison inmates and several months before the court’s final order was issued in August.

This introductory essay provides some background on the two cases at the heart of the litigation, offers a preliminary evaluation of the final inmate release order, and adds some final comments about the possibility of long-term prison reform. Part One suggests that the order was necessary and appropriate given the State’s inability or refusal to take meaningful steps towards remedying serious and persistent constitutional violations. Part Two contends that the opinion is well-reasoned and should withstand several challenges the State will likely bring on appeal. Finally, Part Three concludes that, despite the significant potential impact of the inmate release order, the prospect of long-term reform in California’s prison system remains, sadly, dim.

I. Prison Litigation and Its Critics

Inmate release orders are problematic remedies because they embroil the judiciary in penal policy, an area long thought the province of the legislature. Not surprisingly, the federal courts’ intervention in the prison system has triggered heated reactions. Government officials have argued that the courts have been too quick to intervene, have undermined democratic principles, and have unnecessarily compromised public safety.¹ In this section, I contend

¹ See, e.g., Malia Wollan, California Asks Removal of Prison Overseer, N.Y. TIMES, Jan. 29, 2009, at A18 (quoting Attorney General Jerry Brown declaring that the receiver has become “a parallel government, operating virtually in secret, not accountable, not subject to public scrutiny,” who “feels he has unchecked authority to ride roughshod over the State of California and its officials”); Matthew Cate, Letter to the Editor, Re “Shame of the prisons,” editorial,
that these criticisms are largely unfounded. A quick review of the two cases suggests that the federal courts have been quite cautious — arguably too cautious — in intervening to address flagrant constitutional violations.

A. Serious and Persistent Constitutional Violations

The Eighth Amendment requires states to provide at least minimally adequate health care for their inmates. In both Coleman and Plata, federal district courts found serious, even egregious, constitutional violations of this minimum standard of care. The Plata case offered an illustration of how dire the situation has become. Several years into the litigation — after the state agreed to make changes to the system — the Court’s experts reported on the state of care in the prison system. Judge Thelton Henderson, who presided over the Plata case, described the results:

The report was shocking. The experts reported that they observed widespread evidence of medical malpractice and neglect. When they attempted to review a backlog of 193 death records, the experts encountered prisons where records could not even be located. Among the records they were able to review, the experts found 34 of the deaths highly problematic, with multiple instances of incompetence, indifference, neglect, and even cruelty by medical staff.\(^5\)

Moreover, the report found that “[m]any of the [prison] physicians have prior criminal charges, have had privileges revoked from hospitals, or have mental health related problems,”\(^6\) and “[e]xpert review of prisoner deaths in the CDCR shows repeated gross departures from even minimal standards of care.”\(^7\) Findings such as these continue in excruciating detail for nearly fifty pages.

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\(^5\) February 12, L.A. TIMES, Feb. 17, 2009, at A16 (“A mass release of felons would compromise public safety . . . . It is time to turn control of the prison system back to those who are accountable to the people of California.”).


\(^7\) Id. at *20.
Following this report, the court decided to visit one of the prisons to gain a first-hand view of the conditions. The court toured San Quentin State Prison on February 10, 2005, one year after the prison was supposed to have achieved compliance with the minimum standards of care. The result of the tour was horrifying. The court explained:

The physical conditions in many CDCR clinics are completely inadequate for the provision of medical care. Many clinics do not meet basic sanitation standards.

... For example, the main medical examining room lacked any means of sanitation — there was no sink and no alcohol gel — where roughly one hundred men per day undergo medical screening, and the Court observed that the dentist neither washed his hands nor changed his gloves after treating patients into whose mouths he had placed his hands.

Judge Henderson concluded: "[I]t is an uncontested fact that, on average, an inmate in one of California’s prisons needlessly dies every six to seven days due to constitutional deficiencies in the CDCR’s medical delivery system.”

Recent studies indicate that serious deficiencies remain. In his presentation, Donald Specter described a report of the receiver, which analyzed 395 prisoner deaths during 2007. The report found 234 cases that involved an extreme departure from community

9. Plata, 2005 U.S. Dist. LEXIS 43796, at *41-42. The report continued:
   [The Outpatient Housing Unit] was in deplorable condition. The cells were dirty, the nursing station is beyond sight or sound of the cells, and there is no examination room on the unit so that examinations are often performed on the cell floors or even through the food slots.
   ... 
   The pharmacy was in almost complete disarray (with unlabeled cardboard boxes piled in no particular order, antiquated and dirty computers, wiring suspended like a drunken spider’s web, and extremely frustrated nurses and technicians), and there was an obvious shortage of medical supervisory and line staff.
standards of care. In other words, nearly sixty percent of the patients were given substandard care. Moreover, of the 395 deaths, sixty-eight (approximately seventeen percent) were deemed "preventable" or "possibly preventable." In this group, the report found 120 separate lapses in care. The constitutional violations found in *Plata*, in other words, represented serious and widespread departures from proper care.

The *Coleman* case found similarly severe violations, though Judge Lawrence Karlton's opinions were less dramatic and graphic. According to Judge Karlton, the State had no "systematic program for screening and evaluating inmates for mental illness." As a result, "thousands of inmates suffering from mental illness [went] either undetected, untreated, or both." Similarly, basic care was wholly inadequate. The court found persistent and extensive "delays in access to necessary mental health care," which in some prisons reached a "crisis level." This was partly due to the fact that the CDCR was "significantly and chronically understaffed in the area of mental health care services."

Where services were offered, they were frequently substandard. For example, medication was haphazardly distributed, and the court found serious problems in record keeping, "including disorganized, untimely and incomplete filing of medical records, insufficient charting, and incomplete or nonexistent treatment plans at most prisons." Additionally, "inmates [were] typically transferred between prisons without even such medical records as might exist." Moreover, the prison system had no means to identify or

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14. Id. at *73-74 (quoting Coleman, 912 F. Supp. at 1306). As an indication of how little attention was focused on the issue, Judge Karlton noted that the government estimated that only three percent to four percent of the prison population suffered from a serious mental illness. However, experts ultimately determined that "the number of prisoners having an Axis I mental condition and thus requiring treatment was . . . closer to twenty percent." Honorable Lawrence Karlton, Speech at the California Correctional Crisis Conference (Mar. 20, 2009).
16. Id. at *75 (quoting Coleman, 912 F. Supp. at 1307).
17. Id. at *74 (quoting Coleman, 912 F. Supp. at 1314).
18. Id.
correct these defects because it had no “quality assurance” program to ensure the competence of their mental health care staff and the adequacy of the services.  

These kinds of findings led the Coleman court to conclude that California prisons lacked the “basic, essentially common sense, components of a minimally adequate prison mental health care delivery system,” including “proper screening; timely access to appropriate levels of care; an adequate medical record system; proper administration of psychotropic medication; competent staff in sufficient numbers; and a basic suicide prevention program.”  

B. Cautious – Perhaps Too Cautious – Approach

With these significant constitutional violations at issue, the question was not whether the federal courts would intervene, but how they would intervene. On first impression, the court’s inmate release order seems to reflect the efforts of “activist” judges, moving aggressively to impose their own ambitious policies on the democratically elected branches. In fact, the court’s actions were anything but rash or imprudent. Given the history of the two cases, the federal courts have acted with excessive caution.

These cases have long histories. Coleman was filed nearly two decades ago in 1991, which is why Judge Karlton noted in his keynote speech that the case was initially designated as Coleman v. Wilson (after Governor Pete Wilson). It took the court five years to conclude that the mental health services in the California prison system were constitutionally insufficient. Rather than rushing to release prisoners, the court spent the next fourteen years trying to encourage, urge, cajole, and coerce the State to take appropriate remedial steps.

All told, Judge Karlton issued more than seventy remedial orders directing improvements in the mental health system. With

19. Id. at *75 (quoting Coleman, 912 F. Supp. at 1308).
20. Id. at *75 (quoting Coleman, 912 F. Supp. at 1298).
21. Id. at *71 (“[I]n June 1994 the magistrate judge found that defendants’ delivery of mental health care to class members violated the Eighth Amendment. On September 13, 1995, the district court adopted the magistrate judge’s decision, with modifications.”).
22. Id. at *70 (“After fourteen years of remedial efforts under the supervision of a special master and well over seventy orders by the Coleman court, the California prison system still cannot provide thousands of mentally ill inmates with constitutionally adequate mental health
repeated state intransigence, Judge Karlton ultimately appointed a special master to provide recommendations on how to fix the system. Due to the court’s continuing oversight, some progress was been made in fixing the mental health system. Nonetheless, as Judge Karlton noted, progress has been inconsistent and ultimately unsatisfactory.  

In his luncheon speech, Judge Karlton lamented that nearly two decades into the suit, he is still being forced to issue remedial orders to require the state to construct a sufficient number of beds to care for mental health patients. Donald Specter, in his presentation, noted the State’s seemingly passive-aggressive efforts to forestall reform. After 2006, the State agreed it would be better to let the receiver handle the construction of the new bed plan, since the receiver could act more quickly and efficiently. However, as Specter noted, even before the receiver could act, the State “went to court to actually block the receiver from constructing the very beds that they agreed were necessary.”  

When Judge Karlton responded by asking the State for its plan to construct the beds, State attorneys asked for several weeks to devise a plan, and then asked for a further ninety day extension. Judge Karlton was furious, stating it was incomprehensible that after fourteen years, the State still did not have a bed plan. According to Donald Specter, Judge Karlton declared that the State demonstrated “an unacceptable lack of commitment to its constitutional duty much less towards this court.”  

The *Plata* case offered a similar story of State stonewalling. Although it has been in litigation a shorter time, the *Plata* court has faced an even greater degree of state intransigence. After the plaintiffs filed suit in 2001, the State ultimately agreed to a stipulated settlement that required it to adopt comprehensive reform of its care, and critically mentally ill inmates [are] languishing in horrific conditions without access to immediate necessary mental health care.” (internal quotation omitted).

23. Karlton, *supra* note 14 (“Perhaps it suffices to say that through the years and a variety of governors and prison administrators, progress has been made in each of the areas of deficiency, but no institution has yet met the minimum standards, nor have any of the deficiencies been fully satisfied.”).  


25. Id. In his luncheon speech at the California Correctional Crisis Conference, Judge Karlton was much more restrained, simply noting that “just recently, I held a hearing dealing with the failure of the state to have a viable ‘bed plan’ for members of the *Coleman* class needing beds separate from the general population.” Karlton, *supra* note 14.
medical policies and procedures at all institutions. The plan was to be implemented on a staggered basis. Seven prisons would implement changes in 2003, with five additional prisons implementing changes each succeeding year until all thirty-three prisons were rehabilitated. The State also "agreed to the appointment of medical and nursing experts," to advise the court on the progress of the reforms.

Despite these pledges, when the court reviewed the State's progress in 2004, it found that not a single prison had successfully implemented the plan. "Even more disturbing, the court experts submitted a report on July 16, 2004 which found an 'emerging pattern of inadequate and seriously deficient physician quality in CDC facilities,'" such as a retired surgeon that continually made serious life-threatening mistakes. "The Report also identified various systemic problems, including inadequate peer review and the need for greater centralization of physician supervision, credentialing and discipline."

A 2005 report on conditions at San Quentin was equally damning. The report noted "multiple instances of incompetence, indifference, cruelty, and neglect." In a review of ten deaths at the prison, experts noted "serious problems [in medical treatment]; most deaths were preventable... Routine medical care [was] replete with numerous errors."

Facing continued foot-dragging by the State, Judge Henderson initiated proceedings to determine whether to place the entire prison medical system in receivership. On June 30, 2005, after holding six days of hearings, the Plata court ruled that it would appoint a receiver. As Judge Henderson himself stated, this was "the largest
federal takeover of a state prison medical care system in our country's history." 34

Appointing a receiver, the court acknowledged, "is a drastic measure." 35 Unlike a special master, who serves as an advisor to the court (and lacks the same kind of independent decision-making power), a receiver is placed within the state bureaucracy. The receiver is authorized by the court to make whatever changes he or she deems appropriate to bring the system into compliance with constitutional norms. And the receiver need not ask the court for approval each time he or she acts. That means the receiver can hire or fire staff, reorganize an agency, and even demand funds from the state treasury. Moreover, the receiver's authority is derived from the federal courts and the U.S. Constitution, thereby giving it the power to ignore or suspend state law. 36

Using the full power of the office, the first receiver, Robert Sillen, moved aggressively to reform the state prison bureaucracy, threatening state officials with serious repercussions if they did not comply with his orders. When the State refused to fund certain prison construction projects, Sillen declared that if the state did not act soon, he would drive a van to the state treasury and start loading money into the back. 37 In January 2008, Robert Sillen was replaced by Clark Kelso, the current receiver (and one of the presenters on the medical services panel).

Judge Henderson's decision to appoint a receiver was not an easy one. 38 Even Judge Karlton, who oversaw Coleman, expressed some

34. Thelton Henderson, Confronting the Crisis of California Prisons Symposium Keynote Address: Confronting the Crisis of California Prisons, 43 U.S.F. L. REV. 1, 2 (2008). The first receiver, Robert Sillen, began work on April 17, 2006. He was replaced in January 2008 by Clark Kelso, the current receiver.


36. In July 2008, during the budget crisis, Governor Schwarzenegger temporarily required all state employees to receive the minimum wage. To the Governor's apparent dismay, the receiver refused to obey the order, citing the receiver's overriding legal authority. See, e.g., Jon Ortiz, Kelso: Keep Your Chin Up, SACRAMENTO BEE STATE WORKER, July 25, 2008, http://www.sacbee.com/static/weblogs/the_state_worker/2008/07/kelso-keep-your-chin-up.html.

37. Charles Piller, Prison Medical Plan May Far Exceed Need, SACRAMENTO BEE, Mar. 15, 2009, at A1 ("[Sillen] began the colossal reclamation project with vigor and toughness. Sillen once threatened to back up a Brink's truck to state coffers to collect what the receivership was owed. That confrontational posture was widely regarded as his undoing.").

38. Plata, 2005 U.S. Dist. LEXIS 43796, at *91 ("[T]he imposition of a Receivership is a drastic measure. But it is not a measure that the Court has sought, nor is it one that the Court relishes. Rather, the Court is simply at the end of the road with nowhere else to turn.").
unease about the *Plata* court’s use of a receiver, rather than a special master. Nonetheless, Judge Henderson’s decision to appoint a receiver is understandable. Judge Henderson knew about the extraordinary delays occurring in *Coleman*, and he may have determined that a special master would be no more effective in reforming the medical system than it was in reforming the mental health care system. Indeed, the State admitted to Judge Henderson that it lacked the leadership and capabilities to improve the medical care system on its own and that it could not respond to court edicts consistently and effectively.

However one feels about the wisdom of placing the medical system in receivership, the appointment of the receiver did not significantly change the State’s intransigence. In the following two years, 2006-2007, the receiver developed a wide-ranging plan to turn around the prison health care system. The “turn around plan,” as it was called, set out an ambitious schedule to build seven new health centers or hospitals and upgrade facilities at all thirty-three prisons.

Fully implemented, the plan would generate 10,000 new hospital beds — 5,000 earmarked for medical care and 5,000 for mental health care. The total cost was $8 billion. In his presentation, Clark Kelso acknowledged that this was a large amount of money, but he suggested that the cost was a testament to how neglectful the State had been in providing medical care to inmates.

The State initially expressed a willingness to work with the receiver on implementing the plan, but it soon became clear that the...
State would do all it could to impede reform. For example, in July 2008, the receiver requested the first installment of funds — roughly $200 million — to begin implementing the turn around plan. The State refused to comply, the receiver filed a motion in federal court to hold the Governor and State Controller in contempt of court. The State responded by filing a motion to terminate the receivership. It argued, among other things, that the receivership was unlawful under the Prison Litigation Reform Act ("PLRA").

Relations between the receiver and the State reached a low point at this time. The opening paragraph of the receiver’s January 2009 report gave a hint of how tense the situation had become:

During the reporting period, the Governor and Attorney General . . . executed a “flip-flop” and “bait and switch.” The immediate victims of the State’s turnabout are four federal district courts and respect for the rule of law; the ultimate victims are the tens of thousands of class members who are waiting for constitutionally required improvements in their medical care as well as the citizens of the State of California.

Meanwhile, state officials viciously attacked the receiver. The Attorney General, for example, declared that the “receivership has become a government unto itself, operating without accountability, without public scrutiny and without clear standards.”

Given these tensions, Joyce Hayhoe’s claim during the conference that “the

45. *Plata v. Schwarzenegger*, 560 F.3d 976, 980 (9th Cir. 2009). The district court ultimately ordered the State to turn over $250 million to the receiver. *Id.*

46. *Id.* at 980.


49. Michael Rothfeld, *Officials Urge End to Prison Oversight*, L.A. TIMES, Jan. 28, 2009, at B1. The receiver for his part fired back: “In a jab at Brown, who is exploring a run for governor, Kelso wrote that ‘public officials who choose to run their political campaigns for higher office’ by trying to block judges’ orders ‘actively promote disrespect for the courts.”’ *Id.* Kelso also “took a swipe at Schwarzenegger for reneging on pledges of cooperation, writing that ‘court orders are not Hollywood contracts . . . where promises are cheaply given and then ignored when convenient.’” *Id.*
Department and the Receiver are working well together,” was surprising, to say the least.\(^\text{50}\)

Any hope that 2009 would result in greater harmony between the receiver and State has proved to be short-lived. A possible breakthrough seemed to occur in the spring, when the receiver agreed to scale back his $8-billion plan. Rather than building 10,000 new beds, the receiver unveiled a new plan to construct only two hospitals with a capacity of 3,400 inmates. The cost under this revised plan would drop substantially to $1.9 billion.\(^\text{51}\) The receiver also agreed to end efforts to hold the Governor in contempt of court for failing to provide construction funds. In return, the receiver demanded that the State provide the required funds and end efforts to have the receivership terminated.

For a brief moment, the parties seemed to agree. In early summer 2009, Secretary Matthew Cate and the receiver outlined the general contours of a plan. The parties agreed to report back to the court with a full-fledged agreement by the first week in June 2009. Once again, the State’s promises proved empty. As the days passed, state officials refused to sign off on the agreement. As a result on June 17, 2009, Judge Karlton called the Governor’s lawyers into court and excoriated them. He told them it was “intolerable” that the administration has not yet approved the tentative agreement; and gave them fifteen days to sign the agreement.\(^\text{52}\) Karlton also warned that if the State failed to sign the agreement and also failed to propose a reasonable, fully-funded alternative: “I’m going to start eating into their budget in a real dramatic way.”\(^\text{53}\) The judge continued, “[t]hose are orders of the court that must be obeyed—not hoped for, not prayed for—obeyed. I’m not kidding.”\(^\text{54}\)

Two weeks later, the State responded by disowning the tentative agreement. “Schwarzenegger issued a statement saying the State

\(^{50}\) Joyce Hayhoe, Legislation Assistant Secretary, Cal. Dep’t of Corr. and Rehab., Presentation at the California Correctional Crisis Conference (Mar. 19, 2009).

\(^{51}\) Don Thompson, *Judge Sets Deadline for California Prison Decision*, VENTURA COUNTY STAR, June 16, 2009. The cut is not quite as dramatic as it first appears. The original $8 billion plan was to be spent over ten years. The compromise proposal was to cover anticipated health care needs for the next four years. See, e.g., Bob Egelko, *Governor Dumps Plan to Build Prison Hospitals*, S.F. CHRON., June 26, 2009, at A1.

\(^{52}\) Thompson, * supra* note 51.

\(^{53}\) *Id.*

\(^{54}\) *Id.* After collecting himself, the judge seemed to think twice about his words, adding “Take that back. I’m not threatening anything.” *Id.*
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‘cannot agree to spend $2 billion on state-of-the-art medical facilities for prisoners while we are cutting billions of dollars from schools and health care programs for children and seniors." Donald Specter, the lead lawyer for the inmates in *Plata*, commented, "This will make the courts have to intervene more, because the state said it won't do even what Secretary Cate says is necessary . . . . It shows, once again . . . a completely dysfunctional system."  

II. The Three-Judge Panel Decision

Patience exhausted, Judges Henderson and Karlton began to consider an even more extreme remedy: an inmate release order. Such orders are governed by the PLRA and can only be issued by a specially appointed three-judge panel. On July 23, 2007, both Judges Henderson and Karlton moved for the establishment of such a panel. The district court panel that was convened consisted of three judges — Judge Karlton, Judge Henderson, and Judge Stephen Reinhardt of the Ninth Circuit Court of Appeals.

A. The Panel’s Findings

The trial commenced in November 2008. On February 9, 2009, the panel issued its preliminary order, announcing its conclusion that an inmate release order was appropriate. The order was “preliminary” in order to give the parties time to reach a settlement. The court encouraged the parties to immediately engage in settlement negotiations. Those talks, if they ever began, went nowhere.

Without any settlement possibilities, the court proceeded to issue its final order on August 4, 2009. The lengthy opinion focused appropriately on the PLRA’s requirements for issuing an inmate release order. As specified in the statute, the court first found that crowding was the “primary cause” of the constitutional violations.

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56. Id.
58. Id. at *224.
The court also found that "no other relief" was available that would remedy the violation in a timely and effective manner.\(^{59}\)

The court then turned to the question of the scope of the relief. The PLRA requires that any order "extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs."\(^{60}\) After reviewing various evidence and testimony, the court concluded that the prison population should be capped at 137.5\% of design capacity.\(^{61}\) Based on current population numbers, that meant approximately 40,000 inmates would need to be released — more than a quarter of the current prison population. The court asked the State to come up with a plan to determine which inmates would be released early.

### B. Appeal to the U.S. Supreme Court

The State has declared that it will appeal the inmate release order. Under the PLRA, appeals from decisions of a three-judge panel are taken directly to the Supreme Court. Given the importance of the decision, the expectation is that the Supreme Court will grant review. Although it is too early to say which specific arguments the State may assert, three seem particularly likely.

#### i. The Primary Cause

One approach for the State to take would be to challenge the court's findings that crowding is the "primary cause" of the constitutional violations. As the State argued, there are many different reasons for the constitutional deficiencies, including inadequate staffing, lack of equipment, poor leadership, and overcrowding itself. Fixing any one of these problems will not necessarily ensure that the prison health care system is constitutionally adequate. If that is the case, then on what basis can one say that overcrowding is the primary cause of the constitutional violations? The State will surely argue that crowding is only one of many causes, not a "primary" cause.

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\(^{59}\) Id. at *232.


\(^{61}\) Coleman, 2009 U.S. Dist. LEXIS 67943, at *268.
On the other hand, plaintiffs have a reasonable argument why crowding is the “primary” cause of the constitutional shortcomings. A primary factor might be viewed as the factor which, if rectified, would move the prison system farthest towards constitutionally adequate levels. In this light, the court’s finding that crowding is the primary factor makes sense.

As the court pointed out, addressing the crowding problem would lead to immediate and significant gains across the board — improving living conditions, staffing, supplies; it would move the system dramatically toward the constitutional minimum. Addressing other factors instead — such as the inadequate staffing or insufficient supplies — would fail to provide comparable benefits (at least without addressing the crowding problem as well).

**ii. Reasonable Time for Alternative Remedies to Work**

Another argument the State might raise focuses on the haste with which the three-judge panel moved to consider an inmate release order. According to this line of attack, the court should have given the receiver more time to remedy the constitutional violations. Indeed, the PLRA, itself, requires the court to try alternative remedies first, and to give the State a “reasonable amount of time to comply” with those previous court orders.

The receiver was appointed in 2006, but within eighteen months the federal courts had called for a three judge panel to determine whether an inmate release order was necessary. All parties appear to agree that the receiver has made significant improvements in the prison medical system already. The State’s position has been that the receiver can bring the system into constitutional compliance without an inmate release order.

This argument is superficially appealing, but it faces serious obstacles. As an initial matter, the receiver himself has argued that overcrowding pervades the system and undermines his reform.

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62. *Id.* at *141-42.

63. Moreover, the State’s interpretation of “primary cause” could prevent the courts from adopting remedies necessary to correct the constitutional violations. Such an interpretation would likely pose serious constitutional problems. That was the view, as well, of Associate Attorney General John Schmidt, who testified in the Senate on a precursor to the PLRA. *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing on S. 104-573 Before the S. Comm. On the Judiciary, 104th Cong.* 13 (1995).
Moreover, the State has repeatedly put up roadblocks in front of the receiver’s remedial efforts. Donald Specter offered an illustration during his presentation at the conference. The State had argued before the panel that an inmate release order was inappropriate because the receiver was on the job and making improvements. However, as Specter observed, “before we could finish the argument in the case, [the State’s attorneys] went to court to get rid of [the receiver].”

In a similar vein, the State has consistently refused to give the receiver the resources needed to improve the prison medical system. It has refused to provide the $8 billion the receiver said was necessary to bring the medical system up to constitutional standards. Even after the receiver reduced his proposal to less than $2 billion, the State refused to sign off on the agreement.

Finally, even if the State were to come up with the funds demanded by the receiver, it would take years for the proposed building plan to be completed. Given the State’s repeated efforts to block the receiver’s work, it seems reasonable to conclude that the State has been given more than enough time to demonstrate its willingness to work with the receiver.

### iii. The Size of the Release

A third challenge focuses on the size of the inmate release order. The State will no doubt argue that a population cap at 137.5% of design capacity is too extreme. The problem with this argument on appeal is that the State failed to offer persuasive evidence at trial demonstrating that a significantly smaller inmate release order would be sufficient to address the constitutional violations.

In its opinion, the panel worked methodically through the evidence presented. The panel began by acknowledging that a good argument could be made that the prison population should be limited

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64. See, e.g., Coleman, 2009 U.S. Dist. LEXIS 67943, at *247 (“The Plata Receiver has determined that adequate care cannot be provided for the current number of inmates at existing prisons and that additional capacity is required to remedy the medical care deficiencies that exist in California’s prison system.”).

65. Specter, supra note 11.
to the design capacity itself. Nonetheless, because the plaintiffs themselves only sought a population cap at 130% of design capacity, the court determined this was the lowest level it would consider.

At the same time, the court cited some evidence that a population cap of up to 145% might be sufficient. The court referred to a report by the Corrections Independent Review Panel, which concluded in 2004 "that the California prison system’s ‘operable capacity’ was 145% of its design capacity." The court observed that the “[p]anel’s estimate was prepared by a group of experienced California prison wardens, who suggested that a system operating at 145% design capacity could ‘support full inmate programming in a safe and secure environment.’" Nonetheless, the court also found problems with the 145% estimate, noting that the number focused on the ability of the facilities to provide “educational, vocational, substance abuse, and other rehabilitation programming,” but “did not account for programming associated with mental health or medical treatment .... When mental health treatment needs are taken into account, the maximum operable capacity will be lower.”

Given these considerations, the court concluded that the limit on California’s prison population should be somewhat higher than 130% but lower than 145%. Rather than adopting the 130% limit requested by plaintiffs, we will out of caution require a reduction in the population of California’s adult prison institutions to only 137.5% of their combined design capacity — a population reduction halfway between the cap requested by plaintiffs and the wardens’ estimate of the California prison system’s maximum operable capacity absent consideration of the need for medical and mental health care.

66. Coleman, 2009 U.S. Dist. LEXIS 67943, at *278 (“[T]he evidence at trial demonstrated that even a prison system operating at or near only 100% design capacity faces serious difficulties in providing inmates with constitutionally sufficient medical and mental health care.”).
67. In support of the 130% number, plaintiffs relied on a report by the State’s own advisors, indicating “the prison system’s population should not exceed 130% design capacity, the federal standard for prison overcrowding.” Id. at *284.
68. Id. at *285-86.
69. Id. at *286.
70. Id. at *287.
71. Id. at *290.
The court’s split-the-difference analysis seems arbitrary, and the State will no doubt argue that this undermines its validity. Nonetheless, this is unlikely to be a successful argument for overturning the court’s remedial order. Courts typically have a significant degree of discretion in choosing appropriate remedies, and line-drawing is inevitable in these cases. Moreover, the court’s decision to narrow the remedy to the range of 130-145% seems reasonable, and the Supreme Court is unlikely to reverse the ruling simply because it disagrees with the precise number chosen within that range.

Concluding Thoughts

The litigation in *Plata v. Schwarzenegger* brings into sharp focus the grossly deficient medical care in California’s prison system. Yet, as Clark Kelso pointed out in his presentation, substandard health care is just the canary in the coalmine, the most obvious sign of a system that largely neglects the treatment and care of offenders.\(^72\) Several studies have pointed out that California’s prisons are deficient in a range of useful programs and support services, including education programs, drug treatment services, and vocational training.\(^73\)

What explains this sorry situation? Over the last decade, the CDCR has been led by a number of well-meaning and highly competent Secretaries. And yet the agency has proved itself entirely incapable or unwilling to make the kinds of dramatic changes needed to improve prison conditions. Why?

Conference participants mentioned several possible answers. Donald Specter, in his presentation, noted that services, like health care, are not a “core competency” of CDCR.\(^74\) Prisons are typically quite good at custody decisions; however, medical care is, as Specter puts it, an “add on.”\(^75\) Judges Henderson and Karlton identified

\(^{72}\) Kelso, *supra* note 44. 
\(^{73}\) See, e.g., *Joan Petersilia, Understanding California Corrections* 39-44 (2006); *Little Hoover Comm’n, Solving California’s Correctional Crisis: Time is Running Out* 24-5 (2007) (discussing lack of “education programs, job training, and substance abuse treatment programs”).  
\(^{74}\) Specter, *supra* note 11.  
\(^{75}\) Id.
another problem, which they called “trained incapacity,” a form of bureaucratic inertia that ensures prison officials will resist any serious reform efforts.\textsuperscript{76}

Both factors make it difficult for even motivated prison administrators to make widespread reforms. But these elements only touch on the surface of the problems. An even more fundamental obstacle is that many of the key levers of control over the prison system are beyond the Secretary’s authority. Any effort to improve prison conditions, build staff, and expand rehabilitation services requires either an increase in funding or a reduction in the number of inmates. Either change requires legislative authorization.

With CDCR officials stymied, the judiciary has become the remedy of last resort. And, in fact, federal courts have achieved substantial success. The orders generated in the \textit{Plata} and \textit{Coleman} litigation have improved prison conditions, and the three judge panel’s decision will improve things further (assuming it is upheld on appeal). Nonetheless, as many of the participants in the litigation recognize, judicial intervention is not a panacea for the problems that plague the prison system.

The CDCR’s resistance to reform will make it difficult for the federal courts to remedy serious constitutional violations, as the \textit{Plata} and \textit{Coleman} litigation make clear. Judge Henderson observed that, for any progress to be made, the judiciary must engage aggressively and continually.\textsuperscript{77} But even an engaged and forceful judiciary will face significant obstacles to reform.

\textsuperscript{76} As Judge Henderson notes:

‘Trained incapacity’ refers to a situation in which erecting barriers to change becomes an ingrained means of self-preservation for bureaucrats, so that, when serious institutional problems threaten or challenge the bureaucracy — or require it to bend or flex — we find that those within the institution have actually trained themselves to be incapable of responding.

Henderson, \textit{supra} note 34, at 7. Judge Karlton explains one way trained incapacity develops:

Like any large bureaucracy, it [the prison administration] has put in place a series of rules designed to insure that subordinates do their job. The problem is that the rules become a justification for both conduct and a failure to act. If the rule does not precisely address an issue, there is, in the minds of those who are subject to the rules, no conduct required or indeed permitted. In a real sense the rules become a justification for the status quo — no matter how inadequate the status quo might be. I think that one problem is the belief, present in any large bureaucracy, that you can’t be criticized for following the book.

\textit{Karlton, supra} note 14.

\textsuperscript{77} In reflecting on his role, Judge Henderson observed:
The judiciary does not have free reign to order additional taxes for hospital construction. That is why plaintiffs in the *Plata* and *Coleman* litigation sought to obtain funding for hospital construction by redirecting funding previously authorized for prison building projects. Even where permitted, courts are extremely hesitant to raid the treasury to pay for prison services, recognizing that such steps would prove very controversial.

Of course, the court has legal authority under the PLRA to order inmates released. But even this remedy is problematic as a long term solution. A prison release order can be met by identifying certain classes of offenders who deserve release. But long-term reform requires a comprehensive reform of the sentencing system, an effort that is far beyond the competence of the judiciary. Again, without legislative support, the effort to reduce the prison population over the long run will likely fail.

Finally, beyond these difficulties, the court simply lacks the authority to make certain kinds of necessary reforms. The court’s power, after all, is linked to its authority to remedy constitutional violations. So even where constitutional violations have been identified — as in the health care area — judicial relief will not accomplish anything more than the constitutionally minimum level of care. Moreover, some deficiencies in the prison system do not implicate constitutional rights. For example, increased educational programs or vocational training may be beneficial on both policy and moral grounds. But it is doubtful that offenders have a constitutional...

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[I]t struck me just how attentive, just how “active,” a judge must be to serve as an effective catalyst for change in the context of prison litigation. Some might even suggest that being so very “active” makes one an “activist” judge, with all the pejorative overtones associated with that term. However, judges should take an active role to induce defendants to comply with their constitutional obligations, and that does not make an activist judge. Being actively involved is simply a necessary element of discharging the court’s obligation to uphold and enforce the rights so carefully guaranteed by our Constitution. Henderson, *supra* note 34, at 11-12.


79. See Aaron Rappaport, Sentencing Reform in California, 7 Hastings Race & Poverty L.J. (this issue, Winter 2010).

80. Karlton, *supra* note 14 ("[I]t should be kept in mind that the federal courts’ role is circumscribed by our jurisdiction. We do not have a writ to solve all problems, but solely may act relative to state prisons only when the federal constitution has been breached.").
right to either. Only the legislature can make the necessary changes to adopt worthy, but not constitutionally mandated, changes.

A judicial solution seems to be only a partial answer, and one that is not entirely satisfactory. Ultimately, the only long-term solution is the one least likely to occur in the foreseeable future: a legislative solution. The legislature alone has the power to make the necessary reforms in the prison system — increasing funding, changing sentencing laws, pressuring prison officials. However, few are optimistic that the legislature will take the lead on these fronts. Legislators have little incentive to improve prison conditions, and quite a bit of incentive not to make improvements. Improving prison conditions costs money that can be used for more popular programs. Furthermore, prisoners do not represent a significant voting block, and the appearance of being soft on crime can end a political career. It is little wonder that the legislature has failed to make prison reform a priority.

With the legislature, judiciary, and prison bureaucracy ill-equipped to remedy prison conditions, the prospects for long-term reform of the prison system seem bleak. Judge Karlton, in his luncheon speech, declared that, “[w]hat is desperately needed is a change in our culture.” He added regretfully, this is a “need for which I see little to suggest movement.”

Judge Karlton is certainly correct that the public’s view of criminals is unlikely to change dramatically in the near future. But small steps can be taken now to counter the worst tendencies of the system and to lay the groundwork for more significant changes later. Perhaps the most fundamental need right now is to start to shift the public’s thinking about the overriding purpose of the punishment system.

Thinking about punishment in a reflective and reasoned manner is difficult to do. Citizens have gut-level responses to crime, often driven by feelings of fear and anger. Those emotions lead us to respond to crime in a passionate, often vengeful way, rather than in the calm and thoughtful manner punishment decisions require. Reforming our correctional policies thus requires us to move towards a more principled basis for our penal policies. But what principle should guide deliberations?

81. Id.
Since the movement towards determinate sentencing began in the late 70s, retribution (or "just deserts") has been the dominant purpose of punishment. But just deserts allows each citizen’s intuition to serve as the basis for the sanction in any criminal case, and so places no limits on what an individual thinks is just punishment. A far more appealing principle is a utilitarian rationale, with public safety being the overriding goal of the punishment system.

If such a principle were embraced, criminal policy would shift from expressing citizens’ emotional response to crime, towards a more nuanced assessment of policy. The focus would be on determining which sanctions work, and at what cost. This approach would emphasize the need for a careful tallying of costs and benefits of criminal punishments. My hunch is that such an assessment would indicate that in many cases we have overstated the benefits of prison, while ignoring its enormous fiscal and human costs.

One notable effect of the State’s fiscal crisis has been to bring into sharp relief the financial costs of incarceration, and to encourage renewed scrutiny of the way we allocate our correctional resources. But in addition to fiscal costs, we need a fuller understanding of the enormous human costs — costs in terms of lost human capacity and devastated communities. This is not an argument for eliminating prison; it is an argument for being smart about prisons, for reserving prisons for those situations where the benefits clearly outweigh the costs.

The challenge ultimately is to find ways to persuade the public — and ultimately policymakers — to adopt public safety as the guiding (and limiting) principle. To succeed in this endeavor, a range of actors — journalists, judges, academics, public interest groups — need to work together to educate the public on the importance of embracing a utilitarian model of corrections. Sympathetic policymakers, in turn, should seek to modify the State’s penal code — which currently lists “punishment” as the overriding goal — to emphasize the importance of public safety objectives.

With that guiding principle in place, the way forward becomes clearer. For example, it highlights the need for the State to beef-up its ability to gather data and conduct research on crime policies. Only then can policymakers reach intelligent, evidence-based conclusions about the effectiveness of its penal sanctions and rehabilitation.
programs. Only then can we have some comfort that the benefits of a given approach outweigh its costs.

A public safety rationale might also encourage the State to consider innovative institutional arrangements regarding penal policy. For instance, a strong argument can be made that criminal policy should be insulated to some degree from the political realm, which is too often influenced by emotions inflamed by the latest crime of the day. The establishment of an independent sentencing commission is one method that has been proposed to insulate sentencing policy from politics, and hopefully ensure that decisions are made with a long-term perspective, rather than with short-term political goals, in mind.

Plainly, these changes will not be easy to implement. They will require a broad-based effort to shift correctional policy towards public safety concerns. In the end, identifying an overriding purpose of punishment is an essential step. A clear, principled objective for penal policy will offer a blueprint for reform, and hopefully will serve as a catalyst for a revitalized criminal justice system.