

2012

# The Realignment of Incarcerative Punishment: Sentencing Reform and the Conditions of Confinement

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## Recommended Citation

Strutin, Ken (2012) "The Realignment of Incarcerative Punishment: Sentencing Reform and the Conditions of Confinement," *William Mitchell Law Review*: Vol. 38: Iss. 4, Article 4.  
Available at: <http://open.mitchellhamline.edu/wmlr/vol38/iss4/4>

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**THE REALIGNMENT OF INCARCERATIVE  
PUNISHMENT: SENTENCING REFORM AND THE  
CONDITIONS OF CONFINEMENT**

Ken Strutin<sup>†</sup>

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I. INTRODUCTION

The prison model of punishment is overdue for deconstruction<sup>1</sup> or at least a major overhaul.<sup>2</sup> Indeed, the process

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1. See, e.g., Yves Bourque, *Prison Abolition*, 1 J. PRISONERS ON PRISONS 1 (1988) (describing experiences in the Canadian prison system). "Prisons, no matter how 'beautiful' we make them, no matter how 'humane' we would have them, no matter how 'rehabilitative' we devise them, will always be horror houses where public vengeance is administered, cruelly and destructively, on persons who are the most vulnerable and defenseless of our society." *Id.*; Louis X. Holloway, *Prison Abolition or Destruction Is a Must!*, 45 Miss. L.J. 757, 758 (1974) ("Even if all forms of racism and inhumanity could be eliminated from the prison systems, the problems

of sentencing offenders is out of line with the Constitution because it fails to recognize the role of prison conditions as an element of punishment. Every sentence to a term of years pronounced by a judge is incomplete. The length of time to be served is imposed without any mention or consideration of the conditions of confinement. By virtue of their roles, the prosecutor, judge, and defense counsel are not concerned with the most important facet of a prison sentence, the “cruel” nature of incarcerative punishment. Prosecutors formulate sentence recommendations in the blind, defendants make ill-informed decisions about whether to accept plea bargains, judges impose punishments without understanding their full import, and jurors are completely cut out of the loop. It is a game of poker, where no player can see their cards and the accused must bet everything without knowing all the risks.

Presently, those conditions are typically exposed and defined in Eighth Amendment claims brought by prisoners. And when these problems are left unattended they can reach crisis proportions. Mandatory disclosure of prison conditions would give prosecutors more discretion in the charging decision and sentencing recommendation; defense lawyers the opportunity to present mitigating evidence related to alternatives to incarceration, sentence reduction, or institutional classification; and judges the information needed to customize punishment for the individual in the interests of justice.<sup>3</sup> Moreover, a policy that acknowledges

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would only be half solved.”).

2. See Rebecca McLennan, *When Felons Were Human*, ON HUM. (Aug. 16, 2011), <http://onthehuman.org/2011/08/when-felons-were-human/> (“Americans haven’t always perceived prisoners and convicts as exceptional categories of human or even an exceptional category of citizen, undeserving of most or all rights. Both the Progressive Era’s prison reform movement and the prisoner rights movements of the 1950s and ‘60s attracted considerable popular support—so much so, that many states actually embarked on ‘decarceration’ programs in the 1960s and early 1970s (leading at least one prominent sociologist to predict in 1977 that prisons might soon be a thing of the past).”). See generally Carol Steiker, *Introduction*, 9 OHIO ST. J. CRIM. L. 1 (2011) (describing current scholarly thinking about the problem of mass incarceration and possible solutions in a series of articles published in Symposium, *Mass Incarceration: Causes, Consequences, and Exit Strategies*, 9 OHIO ST. J. CRIM. L. 1 (2011), available at <http://moritzlaw.osu.edu/osjcl/issues.php?ID=35>).

3. See Alice G. Ristroph, *How (Not) to Think Like a Punisher*, 61 FLA. L. REV. 727, 748 (2009) (“When the drafters of the new [Model Penal] Code call for ‘evidence-based penology’ and for more rigorous empirical research, perhaps they hope that the facts will speak for themselves. Perhaps the hope is that once people see how much sentences cost, and how little they apparently deter, the only

prison conditions in sentencing practices might serve to stem the tide of prison inflation.<sup>4</sup> Acknowledgment of prison conditions was the motivation behind a newly enacted legislative scheme in California designed to reduce its state prison population and thereby address the unconstitutional conditions within.

Part I of this article begins with a review of the state of incarceration as viewed through the lens of prison populations. Then in Part II, the Supreme Court's watershed decision in *Brown v. Plata* is explored, along with an analysis of its justifications for upholding a mass release order to remedy the inadequate medical and mental health facilities in an overcrowded state prison system. Part III describes California's novel choice of realignment legislation to comply with this order as a legislative approach that does not result in mass release but rather a mass redirection of incoming offenders away from state prisons and into the local corrections system. The potential for criminal sentencing reform inspired by the Court's decision and the state's realignment policy are further explored in Part IV, which examines past and present efforts to fine-tune incarcerative sentencing outcomes mindful of the conditions of confinement. Finally, additional suggestions for uncovering and taking into account the conditions of confinement as an aid to reform are considered at different points along the adjudication spectrum.

## II. BY THE NUMBERS

With more than 2 million men, women, and juveniles behind bars, the prison community is tantamount to a small country or a large city.<sup>5</sup> The enormity of the problems created by prison life has

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rational response will be to reduce the length of prison sentences and look for other alternatives.”).

4. See PEW CTR. ON STATES, PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA'S PRISON POPULATION, 2007–2011 25–26 (2007) [hereinafter PUBLIC SAFETY, PUBLIC SPENDING], available at <http://www.pewcenteronthestates.org/uploadedFiles/Public%20Safety%20Public%20Spending.pdf> (“The profiles highlight states that have broadened their approaches to criminal justice, making prisons one item on a larger menu of options for dealing with the wide spectrum of criminal behavior.”).

5. See LAUREN E. GLAZE, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS 3 tbl.2 (2011), available at <http://bjs.gov/content/pub/pdf/cpus10.pdf> (providing the adult correctional system populations in 2010: Probation, 4,055,514; Parole, 840,676; Prison, 1,518,104; Local Jail 748,728; Multiple statuses (e.g., jail and probation) 86,823; Total 7,076,200); see also PUBLIC SAFETY, PUBLIC SPENDING, *supra* note 4, at ii

drawn the attention of government and civic leaders who joined to form the Commission on Safety and Abuse in America's Prisons.<sup>6</sup> This nonpartisan entity investigated the "dangerous conditions of confinement—violence, poor medical and mental health care, and inappropriate segregation—that can also endanger the public; the challenges facing labor and management; weak oversight of correctional facilities; and serious flaws in available data about violence and abuse in prisons and jails."<sup>7</sup> Overcrowding, solitary confinement, sexual abuse, mistreatment, inadequate medical care, assault, and a myriad of other deprivations are scarcely being addressed by legislative enactments and responsible oversight.<sup>8</sup> Until this changes, the burden will continue to fall to the courts to resolve these issues through prison litigation.

The Eighth Amendment guarantees that no one shall be subject to cruel and unusual punishment.<sup>9</sup> Cruel and unusual punishment cannot be defined based on a locale or the perceived culpability of the accused: neither should the conditions of confinement be selectively defined based on parochial notions of retribution, economics, or politics.<sup>10</sup> Justice should be justice everywhere, and not reliant on the luck of the draw.<sup>11</sup> Thus the

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("[S]tate and federal prisons will swell by more than 192,000 inmates over the next five years.").

6. See *Commission on Safety and Abuse in America's Prisons, Mission*, VERA INST. JUST., <http://www.vera.org/project/commission-safety-and-abuse-americas-prisons/#/project/commission-safety-and-abuse-americas-prisons/mission> (last visited Mar. 27, 2012) (including access to hearing transcripts, expert testimony, and the Confronting Confinement 2006 final report).

7. *Id.*

8. See, e.g., Office of Justice Programs, *Prison Rape Elimination Act Publications and Resources*, U.S. DEP'T JUST., <http://www.ojp.usdoj.gov/programs/prisonrapeelimination.htm> (last visited Mar. 27, 2012) (containing text of act, reports on its implementation, statistical studies, and related resources).

9. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). See generally William H. Danne, Jr., Annotation, *Prison Conditions as Amounting to Cruel and Unusual Punishment*, 51 A.L.R.3D 111 (1973).

10. Cf. *Overton v. Bazzetta*, 539 U.S. 126, 139 (2003) (Thomas, J., concurring) ("The Court's precedents on the rights of prisoners rest on the implicit (and erroneous) presumption that the Constitution contains an implicit definition of incarceration. This is manifestly not the case, and, in my view, States are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivations—*provided only that those deprivations are consistent with the Eighth Amendment*. Under this view, the Court's precedents on prisoner 'rights' bear some reexamination.").

11. See, e.g., John Wisely, *Drunken-Driving Penalties Could Depend on Your Location*, USA TODAY (July 28, 2011, 4:32 PM), <http://www.usatoday.com/news>

laws that decide which offenders go to state prison or local jail, or are eligible for alternatives to incarceration or early release, should be informed by data about the effects that current crime policies are having on the prison population and the conditions within. Full disclosure of jail and prison conditions can become part of a scheme to inform judges, prosecutors, defense attorneys, and defendants who must make choices about the course of criminal litigation. The numerically based incarcerative sentence is inextricably linked to the ensuing punishment and hazards of prison life.

Our Constitution is a fountainhead of fairness that has inspired the legal progress of nations across the world since its creation.<sup>12</sup> And yet, no country following this blueprint has experienced the colossal rise in incarceration that has occurred in America. Out of a total population of about 309 million people,<sup>13</sup> the United States imprisons nearly 2.3 million—representing more than one-fifth of the world’s prison population.<sup>14</sup> It’s a creeping decimal point that bears no relation to changes in crime rates, improvements in controlling human behavior, increases in quality of life, or greater safety for citizens. This is in addition to the other precincts of confinement including noncitizen detention,<sup>15</sup> mental health post release commitments pursuant to the Adam Walsh Act and similar state statutes,<sup>16</sup> and pretrial detention.<sup>17</sup> Unlike the

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/nation/2011-07-28-drunken-driving-first-offense-sentencing\_n.htm (“Different courts use different means, from fines, probation, education classes and jail time, and the court a driver ends up in often is a big factor in the type of punishment handed down.”). See generally Gregory S. Schneider, Note, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1971569>.

12. See generally Albert P. Blaustein, *Our Most Important Export: The Influence of the United States Constitution Abroad*, 3 CONN. J. INT’L L. 15 (1987).

13. See *USA Quick Facts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last revised Jan. 17, 2012).

14. See GLAZE, *supra* note 5, at 3 tbl.1 (stating that the 2010 jail and prison population estimate was 2,266,800); ROY WALMSLEY, INT’L CTR. FOR PRISON STUDIES, *WORLD PRISON POPULATION LIST 1* (8th ed. 2009), available at [http://www.prisonstudies.org/info/downloads/wppl-8th\\_41.pdf](http://www.prisonstudies.org/info/downloads/wppl-8th_41.pdf).

15. According to the federal government, 87,235 noncitizens were held in federal and state facilities in 2008. See HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *PRISON INMATES AT MIDYEAR 2008—STATISTICAL TABLES 19 tbl.20* (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim08st.pdf> (stating the reported number of non-U.S. citizens held in state or federal prisons, by gender, region, and jurisdiction from June 30, 2007 to June 30, 2008).

16. See Nina Totenberg, *Federal Prisoners Kept Beyond Their Sentences*, NPR (Jan.

national debt ceiling, there is no limit to the maximum number of persons who might be incarcerated.

The reasons for the phenomenal growth of the number of incarcerated persons, not to mention parolees and probationers, are changes in public policy and crime control.<sup>18</sup> When Senator Jim Webb presided over the Joint Economic Committee hearing on mass incarceration, he observed: “The growth in the prison population is only nominally related to crime rates. . . . [I]n the Washington Post, the deputy director of the Bureau of Justice Statistics stated that ‘the growth [in the incarceration rate] wasn’t really about increas[ed] crime but *how we chose to respond to crime.*’”<sup>19</sup> This is the fundamental point: prison overpopulation is society’s current response to maintaining law and order.

Crime statistics have long been touted as the principle justification behind longer sentences and prison bond issues.<sup>20</sup> Still, prison building and hence imprisonment of offenders bears little or no relation to crime rates.<sup>21</sup> Of all the factors that

12, 2010), <http://www.npr.org/templates/story/story.php?storyId=122452485>.

17. See MARK MOTIVANS, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2008—STATISTICAL TABLES 5 tbl.1.1 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/fjs08st.pdf> (stating the figures for suspects arrested for federal offenses and booked by U.S. Marshals Service, by offense, from October 1, 2007 to September 30, 2008).

18. See generally WAYNE R. LAFAVE, CRIMINAL LAW 33–34 (4th ed. 2003) (discussing the shift away from the rehabilitative model to a “just deserts” theory of punishment).

19. See *Mass Incarceration in the United States: At What Cost?: Hearing Before the Joint Econ. Comm.*, 110th Cong. 2 (2007) (statement of Sen. Jim Webb, Member, Joint Econ. Comm.) [http://jec.senate.gov/public/?a=Files.Serve&File\\_id=d4b29f7b-bb6b-4f88-be56-f7d1649b5c82](http://jec.senate.gov/public/?a=Files.Serve&File_id=d4b29f7b-bb6b-4f88-be56-f7d1649b5c82) (emphasis added). Senator Webb also noted:

The steep increase in the number of people in prison is driven, according to most experts, by changes in drug policy and tougher sentencing, and not necessarily an increase in crime. Also, the composition of prison admissions has shifted toward less serious offenses: parole violations and drug offenses. Nearly 6 in 10 persons in state prison for a drug offense have no history of violence or significant selling activity. In 2005, four out of five drug arrests were for possession and only one out of five were for sales.

*Id.*

20. See Susan Turner et al., *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN. L. & POL’Y REV. 75, 76 (1999) (noting that money is allocated to states from the federal government based on the average number of violent crimes committed in the preceding three years).

21. Crime rates have continued to fall and have failed to significantly correlate with prison population and reentry numbers, confounding predictions

determine whether there is a rise in crime, the number of people in prison is not chief among them.<sup>22</sup> In other words, locking up millions of people and throwing away the key has not reduced crime as promised.

The proliferation of new penal offenses and stepped-up enforcement of existing penal statutes<sup>23</sup> accompanied by mandatory minimum prison terms, escalating recidivist and truth-

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and perplexing criminal justice policymakers. See PEW CTR. ON STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 20 (2009), available at [http://www.pewcenteronthestates.org/uploadedFiles/PSPP\\_lin31\\_report\\_FINAL\\_WEB\\_3-26-09.pdf](http://www.pewcenteronthestates.org/uploadedFiles/PSPP_lin31_report_FINAL_WEB_3-26-09.pdf) (“[E]ven the statistical models most generous to prisons find that most of the crime drop was attributable to forces other than incarceration. These include a strengthening economy, aging drug epidemics and changes in law enforcement, including the expansion of police forces and the adoption of new policing strategies.”); Richard A. Oppel Jr., *Steady Decline in Major Crime Baffles Experts*, N.Y. TIMES (May 23, 2011), [http://www.nytimes.com/2011/05/24/us/24crime.html?\\_r=3&scp=1&sq=%22Steady%20Decline%20in%20Major%20Crime%20Baffles%20Experts%22&st=cse](http://www.nytimes.com/2011/05/24/us/24crime.html?_r=3&scp=1&sq=%22Steady%20Decline%20in%20Major%20Crime%20Baffles%20Experts%22&st=cse) (“Nationally, the drop in violent crime not only calls into question the theory that crime rates are closely correlated with economic hardship, but another argument as well, said Frank E. Zimring, a law professor at the University of California, Berkeley. As the percentage of people behind bars has decreased in the past few years, violent crime rates have fallen as well. For those who believed that higher incarceration rates inevitably led to less crime, ‘this would also be the last time to expect a crime decline,’ he said.”). See generally ALEXIA COOPER & ERICA SMITH, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS 2 (2011), available at <http://bjs.gov/content/pub/pdf/htus8008.pdf> (“In the last decade (since 2000) the homicide rate declined to levels last seen in the mid-1960s.”); Federal Bureau of Investigation, *Crime in the United States, 2010*, U.S. DEP’T JUST. (Sept. 19 2011), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.2010/2010%20CIUS%20Summary.pdf> (“The 2010 statistics show that the estimated volumes of violent and property crimes declined 6.0 percent and 2.7 percent, respectively, when compared with the 2009 estimates.”). For access to the full report, see Federal Bureau of Investigation, *Crime in the United States 2010*, U.S. DEP’T JUST., <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010> (last visited Mar. 27, 2012). For current and earlier reports, visit Federal Bureau of Investigation, *Uniform Crime Reports*, U.S. DEP’T JUST., <http://www.fbi.gov/about-us/cjis/ucr> (last visited Mar. 27, 2012).

22. See Marc Mauer & David Cole, *Five Myths About Americans in Prison*, WASH. POST (June 17, 2011), [http://www.washingtonpost.com/opinions/five-myths-about-incarceration/2011/06/13/AGfWvYH\\_story.html](http://www.washingtonpost.com/opinions/five-myths-about-incarceration/2011/06/13/AGfWvYH_story.html) (“Harvard University sociologist Bruce Western believes that increased incarceration accounts for only about 10 percent of the drop in crime rates; William Spelman, a professor of public affairs at the University of Texas, puts the figure at about 25 percent. Even if the higher figure is accurate, three-quarters of the crime decline had nothing to do with imprisonment. Other causes include changes in drug markets, policing strategies and community initiatives to reshape behavior.”).

23. See Gary Fields & John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, WALL STREET J. (Sept. 27, 2011), <http://online.wsj.com/article/SB10001424053111904060604576570801651620000.html>.

in-sentencing laws, and buttressed by reflexive parole board denials,<sup>24</sup> are the principle mechanisms for incarcerating people and keeping them in prison.<sup>25</sup> The result is “one in 100 adults looking out at this country from behind an expensive wall of bars.”<sup>26</sup> Removing people from society has not eliminated the causes of crime, and has solved far fewer problems than the cost of this approach has warranted.

The consequences of carceral inflation have not produced any true countervailing benefits.<sup>27</sup> Any law that can incarcerate people and send them to prison for a mandatory number of years will cast an excessively wide net capable of emptying entire city blocks.<sup>28</sup> In

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24. This should be qualified by the changing policies for release, “where parole still exists.” See, e.g., Joe Lambe & Tony Rizzo, *Concerns Arise Over Plan to Dissolve Kansas Parole Board*, KAN. CITY STAR, Apr. 3, 2011, at § B, 1 (“About 15 states have eliminated parole boards.”).

25. See PEW CTR. ON STATES, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 6 (2010), available at [http://www.pewcenteronthestates.org/uploadedFiles/Collateral\\_Costs.pdf?n=8653](http://www.pewcenteronthestates.org/uploadedFiles/Collateral_Costs.pdf?n=8653).

Rather, the growth flowed primarily from changes in sentencing laws, inmate release decisions, community supervision practices and other correctional policies that determine who goes to prison and for how long. And while expanded incarceration contributed to the drop in violent crime in the United States during the 1990s, research shows that having more prisoners accounted for only about 25 percent of the reduction, leaving the other 75 percent to be explained by better policing and a variety of other, less expensive factors.

*Id.* (footnotes omitted).

26. See PEW CTR. ON STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 21 (2008), available at <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf>.

The United States incarcerates more people than any country in the world, including the far more populous nation of China. At the start of the new year, the American penal system held more than 2.3 million adults. China was second, with 1.5 million people behind bars, and Russia was a distant third with 890,000 inmates, according to the latest available figures. Beyond the sheer number of inmates, America also is the global leader in the rate at which it incarcerates its citizenry, outpacing nations like South Africa and Iran. In Germany, 93 people are in prison for every 100,000 adults and children. In the U.S, the rate is roughly eight times that, or 750 per 100,000.

*Id.* at 5 (footnotes omitted).

27. See *Effective Investments in Public Safety: Mass Incarceration and Longer Sentences Fail to Make Us Safer*, JUST. POL’Y INST. (Feb. 2, 2007), [http://www.justicepolicy.org/uploads/justicepolicy/documents/07-02\\_fac\\_massincarceration\\_ac-ps.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/07-02_fac_massincarceration_ac-ps.pdf).

28. See Jennifer Gonnerman, *Million-Dollar Blocks: The Neighborhood Costs of America’s Prison Boom*, VILLAGE VOICE (Nov. 9, 2004), <http://www.villagevoice.com/2004-11-09/news/million-dollar-blocks/1/>.

In Brooklyn last year, there were 35 blocks that fit this category [(Million-

addition, prison walls cast a long shadow that follow inmates back into society, where they are hard put to find housing, jobs, or reunite with their families after years of desocialization.<sup>29</sup>

In a recent article,<sup>30</sup> Professor Bruce Western made three key observations about the corrosive effect of mass incarceration on society: (1) persons with prison records do not fare as well economically as those who have never served time;<sup>31</sup> (2) the families of the incarcerated suffer as well, resulting in harm to the core family units without a father or mother to stabilize them;<sup>32</sup> and (3) the prison preference in punishment negatively impacts the perception of justice in the neighborhoods most directly affected by this shift in population from homes to prison cells.<sup>33</sup> Overall, Professor Western believes that the negative effects of mass imprisonment have reached the tipping point.<sup>34</sup> Sentencing increasingly large numbers of people to jail has an inverse effect on the ability to reduce or control crime. At the same time, those who return to society find fewer opportunities because of their prison records, and therefore become more susceptible to recidivism. Home life for many is disrupted when a parent is sent to prison, putting their children at risk of problems in school or delinquent

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Dollar Blocks)]—ones where so many residents were sent to state prison that the total cost of their incarceration will be more than \$1 million.

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A map of million-dollar blocks, with stark concentrations of color, can quickly convey a sense of how self-defeating many criminal-justice policies have become—how, for example, spending exorbitant amounts of money locking people up means there's far less money available for programs that decrease crime, like education, drug treatment, mental-health care, and job training.

*Id.* at 1, 2.

29. See Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1213 (2010) (discussing the obstacles in employment, housing and civil life facing the massive numbers of prisoners released back into society); Edgardo Rotman, *Criminal Law: Do Criminal Offenders Have a Constitutional Right to Rehabilitation?*, 77 J. CRIM. L. & CRIMINOLOGY 1023, 1023 (1986) (describing the need to recognize that a rehabilitative mindset ought to inform the process for prisoner reentry, which is at least impliedly found in constitutional principles applied to the treatment of prisoners).

30. See Bruce Western, *Locked Up, Locked Out: The Social Costs of Incarceration*, REASON (July 2011), <http://reason.com/archives/2011/06/06/locked-up-locked-out>.

31. *Id.*

32. *Id.*

33. *Id.*

34. See *id.*

behavior.<sup>35</sup>

There are a host of other issues created by government management of such a large segment of the population that are unrelated to incarceration as punishment. Among the collateral but motivating issues fueling policy debates on the efficacy and necessity of prisons are economics, (i.e., the importance of correctional facilities to local and state economies);<sup>36</sup> census counts<sup>37</sup> and voting rights;<sup>38</sup> prison labor and the issues surrounding its use, wages, and working conditions;<sup>39</sup> and the awarding of contracts to private companies to run correctional facilities.<sup>40</sup> These non-penological issues have nothing to do with crime rates, rehabilitation, or the welfare of the incarcerated.<sup>41</sup>

35. *Id.*

36. See Tracy Huling, *Building a Prison Economy in Rural America*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 197 (Marc Mauer & Meda Chesney-Lind eds., 2002), available at [http://www.prisonpolicy.org/scans/huling\\_chapter.pdf](http://www.prisonpolicy.org/scans/huling_chapter.pdf) (“Communities suffering from declines in farming, mining, timber-work and manufacturing are now begging for prisons to be built in their backyards.”).

37. See, e.g., *New York*, PRISON POLY INITIATIVE, <http://www.prisonersofthecensus.org/newyork.html> (last visited Apr. 2, 2012) (“New York State enacted legislation ensuring that incarcerated persons will be counted as residents of their home communities when state and local legislative districts are redrawn in New York next year.”).

38. See, e.g., Marc Mauer, *Voting Behind Bars: An Argument for Voting by Prisoners*, 54 *HOW. L.J.* 549, 550 (2011) (“[F]elony disenfranchisement policies are inherently undemocratic no matter how applied.”).

39. See generally Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 *WM. & MARY BILL RTS. J.* 395 (2009) (discussing how the Eighth Amendment and the Thirteenth Amendment should apply to prison labor); Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 *VAND. L. REV.* 857 (2008) (taking a look at employment’s economic character as seen through the window of legal disputes over prison labor).

40. See, e.g., JUSTICE POLICY INST., *GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE INEFFECTIVE INCARCERATION POLICIES* 2 (2011), available at [http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming\\_the\\_system.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf) (“Approximately 129,000 people were held in privately managed correctional facilities in the United States as of December 31, 2009; 16.4 percent of federal and 6.8 percent of state populations were held in private facilities.” (footnote omitted)). See generally Ruth Levush, *Israel: Unconstitutionality of Privatization of Prisons*, *LIBR. OF CONGRESS* (Nov. 27, 2009), [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205401697\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205401697_text) (“The [Supreme] Court [of Israel, sitting as a High Court of Justice,] determined that the transfer of management and operation of a prison from the state to a private corporation by awarding it a franchise would cause harm to the constitutional rights of freedom of liberty and human dignity of the prisoners.”).

41. In these precarious economic times, prison is seen by some as a substitute for social services. For example, a man voluntarily sought incarceration by

They are all the indisputable concomitants of a form of punishment that is also an industry where “time is money.”

A depiction of the prison-industrial complex phenomena made in 1998 is telling, as the policies that led to this state of affairs have not changed:

[The prison-industrial complex] is composed of politicians, both liberal and conservative, who have used the fear of crime to gain votes; impoverished rural areas where prisons have become a cornerstone of economic development; private companies that regard the roughly \$35 billion spent each year on corrections not as a burden on American taxpayers but as a lucrative market; and government officials whose fiefdoms have expanded along with the inmate population.<sup>42</sup>

The fallout from these policies and practices will be examined in light of the Supreme Court’s watershed decision in *Brown v. Plata*<sup>43</sup> and California’s innovative legislative response.

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robbing a bank in order to gain access to health care. See Diane Turbyfill, *Bank Robber Planned Crime and Punishment*, GASTON GAZETTE (June 16, 2011, 5:18 PM), <http://www.gastongazette.com/news/bank-58397-richard-hailed.html> (describing James Richard Verone, a 59-year-old unemployed man suffering from excruciatingly painful, undiagnosed medical problems and lacking any financial resources, who turned to bank robbery as a means for getting health care). While incarceration might seem like a viable, albeit desperate solution, there is no guarantee that access to health care will be provided. See, e.g., *Ohio Inmate Kills Self; Lawyers Claim Mistreatment*, HERALD-DISPATCH (Huntington, W. Va.) (June 2, 2011, 9:00 PM), <http://www.herald-dispatch.com/news/x295394202/Ohio-inmate-kills-self-lawyers-claim-mistreatment> (“Gregory Stamper, convicted of a double homicide in 1995, hanged himself on Wednesday at Allen Correctional Institution in Lima in northwestern Ohio. Stamper, 61, suffered from damage to his nervous system but was taken off a medication that had helped ease the pain, the Ohio Justice and Policy Center said Thursday.”).

42. Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC MONTHLY, Dec. 1998, available at <http://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/4669/> (“Since 1991 the rate of violent crime in the United States has fallen by about 20 percent, while the number of people in prison or jail has risen by 50 percent. The prison boom has its own inexorable logic. Steven R. Donziger, a young attorney who headed the National Criminal Justice Commission in 1996, explains the thinking: ‘If crime is going up, then we need to build more prisons; and if crime is going down, it’s because we built more prisons—and building even more prisons will therefore drive crime down even lower.’”); see also *Public Safety Performance Project: State Corrections Spending*, PEW CENTER ON STATES (2005), <http://www.pewcenteronthestates.org/uploadedFiles/Statistics%20and%20Facts.pdf> (“Federal, state and local governments spend approximately \$62 billion per year on adult and juvenile corrections.”).

43. 131 S. Ct. 1910 (2011).

### III. *BROWN V. PLATA*: PRISON CONDITIONS REVEALED

The constitutionality of prison conditions was the central issue in a pair of cases<sup>44</sup> that exposed the fault lines in the California criminal justice system and ended up in the U.S. Supreme Court. The Court's five-four decision in *Brown v. Plata*,<sup>45</sup> upholding the three-judge federal panel's order to reduce the state's prison population to 137.5% of design capacity, revealed the shortcomings of mass incarceration for the entire justice system.

In 2011, the State of California became the poster child for the most pernicious outcome of mass incarceration—overcrowding.<sup>46</sup> The deplorable state of its prisons due to the lack of adequate medical and mental health care had been the subject of studies and inquiries over the years,<sup>47</sup> but did not garner serious attention until

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44. Two prisoner class actions were filed against California officials claiming indifference to medical and psychological health needs in violation of the Eighth Amendment. *Plata v. Schwarzenegger*, No. C01-1351TEH, 2005 U.S. Dist. LEXIS 8878 (N.D. Cal. May 10, 2005) (discussing medical neglect in the prison system); *Coleman v. Wilson*, No. CIV S-90-0520 LKK JFM P, 1994 U.S. Dist. LEXIS 20786 (E.D. Cal. June 6, 1994) (discussing inmates with serious mental health care needs). These cases were eventually consolidated before a special three-judge court convened by the Ninth Circuit, which ordered the population reduction. *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, No. C01-1351 TEH, 2010 U.S. Dist. LEXIS 2711, at \*30 (E.D. Cal. & N.D. Cal. Jan. 12, 2010) (noting its August 4, 2009 finding that overcrowding was the primary cause of the failure of the State to provide constitutionally sufficient medical and mental health care and that a prison release order was the only effective remedy under the Prison Litigation Reform Act, 18 U.S.C. § 3626(g)(4)), *rev'd sub nom.* *Brown v. Plata*, 131 S. Ct. 1910 (2011).

45. *Plata*, 131 S. Ct. 1910.

46. See, e.g., Michael Doyle, *Ruling on Prison Overcrowding a Warning to States?*, MCCLATCHY (May 24, 2011), <http://www.mcclatchydc.com/2011/05/24/114702/ruling-on-prison-overcrowding.html> (“All 50 states got a wakeup call this week when the Supreme Court ordered California to aggressively reduce its prison overcrowding. The [C]ourt’s decision will make it easier for judges to shrink prison populations elsewhere. It also could embolden other challenges to prison conditions well beyond California.”).

47. See LITTLE HOOVER COMM’N, SOLVING CALIFORNIA’S CORRECTIONS CRISIS: TIME IS RUNNING OUT (2007), available at <http://www.lhc.ca.gov/studies/185/Report185.pdf>; CORRS. INDEP. REVIEW PANEL, CALIFORNIA PERFORMANCE REVIEW, REFORMING CORRECTIONS 121–61 (2004), available at [http://cpr.ca.gov/Review\\_Panel/pdf/from7to11.pdf](http://cpr.ca.gov/Review_Panel/pdf/from7to11.pdf) (discussing inmate and parolee population management); LITTLE HOOVER COMM’N, BEYOND BARS: CORRECTIONAL REFORMS TO LOWER PRISON COSTS AND REDUCE CRIME (1998), available at <http://www.lhc.ca.gov/studies/144/report144.pdf>; see also Proclamation, Arnold Schwarzenegger, Governor of Cal., Prison Overcrowding State of Emergency Proclamation (Oct. 4, 2006), available at <http://gov.ca.gov/news.php?id=4278> (listing the overcrowding numbers at California state prisons and correctional institutions and proclaiming a

two longstanding lawsuits finally reached the U.S. Supreme Court.<sup>48</sup> The first class action, *Coleman v. Brown*, had been filed in 1990 on behalf of prisoners with “serious mental disorders” who were not receiving adequate care or supervision and endured unbearable conditions resulting in a substantial suicide rate.<sup>49</sup> The other action launched in 2001, *Plata v. Brown*, represented the complaints of inmates with “serious medical conditions” that were not getting necessary treatment.<sup>50</sup>

After dealing with court orders for five years in *Plata* and twelve years in *Coleman*, it was clear that the proposed remedies had failed.<sup>51</sup> The tribulations cataloged by the courts below persisted and finally led to the convening of a special three-judge court to resolve them.<sup>52</sup> Among the problems created by overcrowding, the three-judge court took note of the overtaxed staff and medical facilities and the dangerous and unsanitary environment due to the lack of treatment, all of which hindered the implementation of a constitutional remedy.<sup>53</sup> But the appropriateness of the remedy in response to the harm uncovered had to be measured by the acid test of the Prison Litigation Reform Act of 1995 (PLRA).<sup>54</sup> Thus, the issue boiled down to whether the three-judge court had correctly followed procedures under the PLRA and given the state sufficient time to pursue other options when it concluded that a prisoner release order was the only answer to the conditions uncovered in California’s prisons.<sup>55</sup>

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State of Emergency).

48. *Plata*, 131 S. Ct. 1910.

49. *Id.* at 1922, 1926.

50. *Id.* at 1926–27.

51. *Id.* at 1923, 1931.

52. *Id.* at 1922. The conditions precedent to the three-judge court were met by the *Coleman* court’s appointment of a Special Master, the *Plata* consent decree and receivership, and the State’s failure to address the constitutional claims in both cases. *Id.* at 1930–32.

53. *Id.* at 1932.

54. 18 U.S.C. § 3626 (2006).

55. *Plata*, 131 S. Ct. at 1922–23.

Under the PLRA, only a three-judge court may enter an order limiting a prison population. Before a three-judge court may be convened, a district court first must have entered an order for less intrusive relief that failed to remedy the constitutional violation and must have given the defendant a reasonable time to comply with its prior orders.

*Id.* at 1929 (internal citations omitted). The viewpoints expressed in the majority and dissenting opinions are the first referendum by the Supreme Court on the efficacy and legality of systemic remedies to prison conditions envisioned by Congress under the PLRA.

A. *The Majority*

Prison is the antipode of all the liberties guaranteed under the Constitution. Those liberties are curtailed as part of the punishment narrative. Nonetheless, each person behind bars is a node of needs, rights, and responsibilities, like any citizen in society. Justice Kennedy, writing for the majority in *Brown v. Plata*, recognized that the essentials of food, shelter, and clothing had to be provided and regulated by prison administration.<sup>56</sup> In other words, a person extracted from their place in the world and deposited within the confines of a penal institution radiates needs that are not fairly taken into account in assessing sentencing laws, the size of prison populations, and the resources devoted to that population's care and supervision. This is the overarching reason behind the deleterious conditions of confinement revealed in litigation over violations of the Eighth Amendment, and has resulted principally from prison overcrowding. Yet, was it the essential cause or just one of many?

The majority's analysis of the problem in *Plata* began with the PLRA's requirement that "crowding" had to have been the "primary cause" of the constitutional violation.<sup>57</sup> Since this finding relied on a factual determination, the Court was sensitive to the need for deference to the trial court's findings.<sup>58</sup> Justice Kennedy recounted the long, sad history of mental and medical health care in the California prison system revealed by the record in the courts below.<sup>59</sup>

Vacancies for key health care positions had been unfilled at the time of trial: "[Twenty percent] for surgeons, 25% for physicians, 39% for nurse practitioners, and 54.1% for psychiatrists."<sup>60</sup> And filling these positions did not address the lack

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56. *Id.* at 1928 ("To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. . . . A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.").

57. 18 U.S.C. § 3626(a)(3)(E). "The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that—(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." *Id.*

58. *Plata*, 131 S. Ct. at 1932. Ironically, this deference is a critical fault raised by Justice Scalia in his dissenting opinion, to be discussed later. See *infra* notes 110–25 and accompanying text.

59. *Plata*, 131 S. Ct. at 1932–34.

60. *Id.* at 1932.

of space for performing necessary services.<sup>61</sup> The combination of insufficient staffing and space resulted in “significant delays in treatment.”<sup>62</sup> Inmates seeking mental health care were typically held in segregation until a bed was available, while others were confined in “tiny, phone-booth sized cages.”<sup>63</sup> And the line for medical care was as long as 700 people at any given time.<sup>64</sup> The other concomitants of overcrowding that aggravated the lack of treatment for mental and physical problems included “unsafe and unsanitary living conditions”<sup>65</sup> and an uptick in violence among prisoners.<sup>66</sup>

The State complained that the three-judge court did not permit introduction of evidence showing current conditions.<sup>67</sup> Justice Kennedy found that this assertion was betrayed by the lower court’s reliance on current data and information sources: recent facility tours by expert witnesses; expert evaluations; statistics on suicide rates, staff vacancies, shortages of treatment beds, as well as other data.<sup>68</sup> Overall, information about past problems and current conditions formed a continuum of evidence that was suitable to make a finding under the PLRA. Thus, the State’s claim lacked merit.

While prison crowding was not the only cause of these conditions, it was the foremost. And the lower courts acknowledged that population reduction alone would not be adequate unless accompanied by other reforms (i.e., staff training, improvement in facilities, and revamping existing procedures for health care management).<sup>69</sup> Still, the Court emphasized that the congressional intent behind the PLRA was that overcrowding had

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61. *Id.* at 1933.

62. *Id.*

63. *Id.* See *id.* at app. C for a picture and caption that reads: “Salinas Valley State Prison, July 29, 2008, Correctional Treatment Center (dry cages/holding cells for people waiting for mental health crisis bed).”

64. *Id.*

65. *Id.* At any given time, 200 prisoners live in a gymnasium monitored by only two or three correctional officers and “[a]s many as 54 prisoners may share a single toilet.” *Id.* at 1924 (referring to images in appendix B at page 1949 with captions from the original opinion: “Mule Creek State Prison, Aug. 1, 2008” and “California Institution for Men, Aug. 7, 2006,”).

66. *Id.* at 1934. Inmate violence resulted in lockdowns that increased the workload for staff escorting prisoners to the medical facilities, or resulted in the cancellation of certain programs altogether during these periods. *Id.*

67. *Id.* at 1935.

68. *Id.*

69. *Id.* at 1936.

to be the “primary cause,” albeit not the only reason for unconstitutional prison conditions.<sup>70</sup>

Justice Kennedy went on to observe that addressing these severe deficiencies in the conditions of confinement would be impeded by state budget deficits, absence of political motivation for reform, poorly designed facilities, and across the board administrative mismanagement.<sup>71</sup> Thus, a complex problem necessitated a complex solution. Again, relying on Congress’s intent in authorizing federal courts to handle these types of problems, the Court held that the PLRA was not written to fetter the federal district courts in ordering “practical remedies” in the face of system-wide failure.<sup>72</sup> Population release orders were to be strictly construed, but were still available to be employed in the right circumstances.<sup>73</sup> Releasing prisoners was an option of “last resort,” but still one that could be resorted to.<sup>74</sup> The fact that other steps would also be necessary to fix the problem did not diminish the primacy of the release order.<sup>75</sup> In other words, a finding that prison overcrowding was the primary cause of constitutional violations did not preclude a multifaceted solution.

Another prong of the PLRA statute mandated that “no other relief” would resolve the issue.<sup>76</sup> As already discussed, a principal cause did not mandate a single solution. But the other remedies proffered by the state (i.e., prisoner transfer, new construction, and additional hires), did not measure up.<sup>77</sup> The record demonstrated that transferring prisoners was inadequate to reduce their numbers; new prisons were unlikely to be built in light of California’s fiscal difficulties; plans to expand existing buildings failed to include sufficient administrative facilities; new hires were unlikely in view of the inability to fill those positions so far; and even if those positions were filled promptly, there was no place for them to work.<sup>78</sup> California’s budgetary and legislative roadblocks and the state’s record of not making inroads on its proposed

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70. *Id.*

71. *Id.*

72. *Id.* at 1937.

73. *Id.*

74. *Id.* (quoting H.R. REP. NO. 104-21, at 25(1995)).

75. *Id.*

76. 18 U.S.C. § 3626(a)(3)(E)(ii) (2006) (stating that “no other relief will remedy the violation of the Federal right.”).

77. *Plata*, 131 S. Ct. at 1937.

78. *Id.* at 1937-38.

solutions demonstrated to the Court that the past was prologue. The state's lack of progress became a major factor in approving the three-judge court's decision to order prisoner release.<sup>79</sup>

While population reduction was the most efficacious method for alleviating the pressures created by unconstitutional conditions of confinement, it did not obscure the effect of the sudden reentry of thousands of inmates into California communities.<sup>80</sup> The PLRA was clear about the need to make solutions "narrowly drawn" so that there was a fit between problem and solution obviating the risks of fallout on society at large.<sup>81</sup> The statute demanded that the remedy be proportional to the problem.

A solution contending with overcrowding was bound to have collateral effects. Nonetheless, the remedy of prisoner release was not invalidated for that reason.<sup>82</sup> Thus, the scope of the order had to reflect the unconstitutional conditions in the complaints.<sup>83</sup> The Court found that limiting the remedy only to the plaintiffs in these class actions would have been too narrow and would not address the revolving numbers of persons who would inevitably require medical and mental health treatment.<sup>84</sup> The plaintiffs were victims of systemic problems, and a remedy tailored only to them and failing to fix systemic conditions would only result in chronic litigation by newly minted victims. In addition, a systemic remedy did not translate into an overbroad solution, since administration and resources for the prisons' medical facilities are operated at the

79. *Id.* at 1939 ("A long history of failed remedial orders, together with substantial evidence of overcrowding's deleterious effects on the provision of care, compels a different conclusion today.")

80. See generally *Prisoners and Prisoner Re-Entry*, U.S. DEP'T JUST. ARCHIVE, [http://www.justice.gov/archive/fbci/progmenu\\_reentry.html](http://www.justice.gov/archive/fbci/progmenu_reentry.html) (last visited Mar. 27, 2012).

81. 18 U.S.C. § 3626 (2006).

(a) Requirements for relief. (1) Prospective relief. (A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any *adverse impact on public safety or the operation of a criminal justice system* caused by the relief.

*Id.* (emphasis added).

82. *Plata*, 131 S. Ct. at 1939–40.

83. *Id.* at 1940.

84. *Id.*

state level.<sup>85</sup>

Moreover, granulating the release order would have impinged on the state officials' power to structure an appropriate population reduction plan. Indeed, the three-judge court's order gave California "substantial flexibility" in deciding who should be released,<sup>86</sup> and to customize the release plan based on each prison.<sup>87</sup> Still, some judicial supervision was required to assure that the order was carried out.<sup>88</sup> Deference to the authority and power of state officials in administering the prison system was appropriate according to the Court, but the PLRA did not contemplate complete abdication of judicial oversight—the heart of the problem had been the failure of the state to implement its proposed solutions.<sup>89</sup>

The release of tens of thousands of prisoners by judicial fiat demanded serious attention to public safety and the operations of the criminal justice system. While the PLRA did not require that the prisoner release order have no adverse effects,<sup>90</sup> a balance had to be struck.<sup>91</sup> There was already a steady stream of thousands of inmates reentering California communities,<sup>92</sup> but the population cap would result in a sudden influx of 46,000 prisoners (or fewer if the 9,000 prisoner population reduction that had already occurred was counted).<sup>93</sup> Still, the issue was whether the harm created by unabated overcrowding outweighed the effects on the community of releasing inmates to ease the pressure within prisons.<sup>94</sup> Relying on statistical evidence, and the testimony of state officials and expert witnesses, the three-judge court—employing a cost-benefit analysis—had found in favor of prisoner release.<sup>95</sup>

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85. *Id.*

86. *Id.*

87. *Id.* at 1940–41.

88. *Id.* at 1941.

89. *Id.*

90. *Id.* at 1941–42.

91. *Id.* at 1942.

92. See HEATHER C. WEST ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2009 app. tbl.10 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf> (including California releases by year: 2000: 129,621; 2008: 136,925; 2009: 128,869).

93. *Plata*, 131 S. Ct. at 1923, 1946. It was revealed at oral argument that in the two years since the three-judge court's decision, California had reduced the prison population by 9,000 inmates. *Id.* at 1946.

94. *Id.* at 1941.

95. *Id.* at 1942–43 (including expert evidence in the form of studies of the uneventful release of prisoners in other states to ease overcrowding).

The state had several options that would have had negligible effects on public safety—for example, granting more good time credits and early release to low-risk recidivists; diversion of low-risk offenders to community-based treatment programs or home monitoring; and handling technical parole violations through community-based programs.<sup>96</sup> These channels for supervising and monitoring offenders in the community already existed—and debunked the argument that a decrease in the inmate populations would simply involve opening the prison doors. And other reentry programs were in place to ease the transition of the huge number of inmates who were already returning to the community under normal circumstances.<sup>97</sup> Also, during the pendency of the litigation, officials had begun to implement measure that would redirect state-sentenced prisoners to local jails—with no impact on public safety.<sup>98</sup>

The population cap, 137.5% of design capacity, was arrived at by the three-judge court by extrapolation from official and expert testimony about the appropriate limits.<sup>99</sup> The state contended that the court relied too heavily on experts who were offering policy positions rather than realistic estimates.<sup>100</sup> But Justice Kennedy noted that expert evidence was essential in considering this type of issue and in fashioning a remedy for violations based on prison conditions.<sup>101</sup> For example, the Federal Bureau of Prisons had set 130% as its ultimate aim for population limits, which had been adopted by the experts.<sup>102</sup> And the use of such standards proved instructive albeit nonbinding. At the same time, California's Corrections Independent Review Panel put forward 145% as a workable number.<sup>103</sup> Still, this figure did not take into account the unconstitutional conditions created by inadequate mental and medical health care.<sup>104</sup> In light of the problems to be resolved and the absence of more suitable figures from the state, an equitable compromise seemed appropriate, which is how the lower three-

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96. *Id.* at 1943.

97. *Id.*

98. *Id.* at 1943–44.

99. *Id.* at 1944.

100. *Id.*

101. *Id.* at 1944–45 (“[E]xpert opinion may be relevant when determining what is obtainable and what is acceptable in corrections philosophy.”).

102. *Id.* at 1945.

103. *Id.*

104. *Id.*

judge court reached the 137.5% figure.<sup>105</sup>

The two-year deadline ordered by the lower court was set to run from the date of the Supreme Court's decision.<sup>106</sup> As noted earlier, the state had already made some gains since the 2009 lower court ruling.<sup>107</sup> Yet, the court issuing a remedy for a continuing violation retains responsibility for seeing that it is accomplished in a timely and effective manner.<sup>108</sup> Also, since state prison officials retained the discretion in their choice of methods for attaining the goal of population reduction, the deadline could be modified upon the state's motion based on their efforts at compliance.<sup>109</sup>

Thus, the majority opinion upheld the lower court's decision, rejecting arguments by the state that the remedy was too broad, insufficiently supported, and overstepped the judiciary's proper role by intruding upon the management of the state prison system. However, four justices in two dissenting opinions took up these arguments in their criticism of what they collectively considered to be judicial overreaching.

#### B. *The Dissents*

Justice Scalia, joined by Justice Thomas, voiced strong disapproval of the majority's ruling that would allow the release of thousands of convicted felons back onto the streets.<sup>110</sup> This remedy was so disturbing and "absurd" that Justice Scalia believed the law ought to be interpreted in any manner necessary to avoid the result.<sup>111</sup> He pointed out that a strict reading of the PLRA as well as

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105. *Id.* ("The PLRA's narrow tailoring requirement is satisfied so long as these equitable, remedial judgments are made with the objective of releasing the fewest possible prisoners consistent with an efficacious remedy.").

106. *Id.* at 1946.

107. *See id.* ("At oral argument, the State indicated it had reduced its prison population by approximately 9,000 persons since the decision of the three-judge court. After oral argument, the State filed a supplemental brief indicating that it had begun to implement measures to shift 'thousands' of additional prisoners to county facilities.").

108. *Id.* at 1946–47.

109. *Id.* at 1947; *see* Defendants' December 2011 Status Report in Response to June 30, 2011 Order, *Coleman v. Brown*, No. 2:90-cv-00520 LKK JFM P, No. 01-cv-01351-TEH (E.D. & N.D. Cal. Dec. 15, 2011), *available at* <http://www.cdcr.ca.gov/News/docs/December-3JC-Status-Report.pdf> (status report to three-judge court).

110. *Plata*, 131 S. Ct. at 1950 (Scalia, J., dissenting) ("Today the Court affirms what is perhaps the most radical injunction issued by a court in our Nation's history: an order requiring California to release the staggering number of 46,000 convicted criminals.").

111. *Id.* at 1950–51.

a judge's limited role under Article III of the Constitution should have prevented this overbroad and "dangerous" injunction.<sup>112</sup> The PLRA authorized relief so long as it was specific to individual harm, and not as a means for influencing systemic reforms and micromanaging penal institutions.<sup>113</sup> In fact, to Justice Scalia, claims of inadequate medical or mental health care violating the Eighth Amendment should have required a showing by every single member of the plaintiffs in each class.<sup>114</sup> Justice Scalia contended that because an inmate's status as prisoner seemingly met the threshold requirement for relief under the Eighth Amendment due to a claimed systemic deficiency, it relieved plaintiffs of making individual showings.<sup>115</sup> And a system-wide remedy that would release an indiscriminate number of prisoners would be overbroad and benefit more inmates than warranted.<sup>116</sup>

The majority endorsed the use of a "structural injunction," which recast judges as administrators of societal institutions according to Justice Scalia.<sup>117</sup> And it rendered judges into policymakers as the state had feared.<sup>118</sup> Justice Scalia was very concerned with judges taking on roles outside their province, which was illustrated by the majority's selective reliance on fact-finding that was actually policymaking in disguise.<sup>119</sup> Ironically, to Justice Scalia, this was an instance of misplaced deference to the trial court's findings.<sup>120</sup>

In Justice Scalia's view, this egregious validation of incompetent policymaking by judges was compounded by the extraordinary remedy of indiscriminately releasing thousands of inmates.<sup>121</sup> In addition to the public safety risks, the remedy trumped lawfully imposed sentences. The state's interest in the

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112. *Id.* at 1951, 1966.

113. *Id.* at 1951.

114. *Id.* at 1952.

115. *Id.*

116. *Id.* at 1953 ("Most of them will not be prisoners with medical conditions or severe mental illness; and many will undoubtedly be fine physical specimens who have developed intimidating muscles pumping iron in the prison gym.").

117. *Id.*

118. *Id.* at 1953–54.

119. *Id.* at 1954 ("I am not saying that the District Judges rendered their factual findings in bad faith. I am saying that it is impossible for judges to make 'factual findings' without inserting their own policy judgments, when the factual findings *are* policy judgments.").

120. *Id.* at 1955.

121. *Id.* at 1956.

closure and finality of criminal litigation would be undermined by this open-ended approach to prisoners' rights.<sup>122</sup> In his view, the PLRA was not intended as an instrument for imposing structural injunctions, but rather a way of limiting them.<sup>123</sup> Justice Scalia would have been in favor of specific findings of harm for specific prisoners and specific remedies in fulfillment of the statute's "narrowly drawn" requirement.<sup>124</sup> Systemic constitutional claims were at best rare exceptions under the PLRA.<sup>125</sup> Therefore, in his opinion, mass release of 46,000 prisoners was threading a needle with a sledgehammer without consideration of its impact on society at large.

On the issue of systemic problems, Justice Alito, joined by Chief Justice Roberts, also dissented because not all "undesirable" prison conditions violated the Eighth Amendment.<sup>126</sup> Inhumane but constitutional conditions were not within the province of the PLRA. Justice Alito argued that the three-judge court did not make a finding that the "current" prison population levels were responsible for the deficits in medical and mental health care.<sup>127</sup> Like Justice Scalia, he would have preferred a remedy that tackled the specific problems of those plaintiffs actually harmed by inadequate health care facilities. In his view, the lower court's order was not well-aimed to help those inmates, and painting with such a broad brush increased the risk of harm to society through the discharge of too many prisoners.<sup>128</sup>

Justice Alito's principal criticisms centered on the three-judge court's refusal to take into account evidence about "current" conditions, unwillingness to consider remedies short of mass release, and shortsighted treatment of the risks to public safety.<sup>129</sup> The PLRA was intended to address continuing violations that existed at the time when a remedy could be ordered.<sup>130</sup> According to Justice Alito, the trial court relied on outdated information and foreclosed the state from introducing new evidence.<sup>131</sup> The court's

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122. *Id.* (pointing to similar concerns raised in cases where the Court reversed grants of habeas corpus by the Ninth Circuit).

123. *Id.* at 1958.

124. *Id.*

125. *Id.*

126. *Id.* at 1959 (Alito, J., dissenting).

127. *Id.*

128. *Id.*

129. *Id.* at 1959–60.

130. *Id.* at 1960.

131. *Id.*

choice of remedy was inextricably bound with the present state of the problem to be answered.<sup>132</sup> And relief for constitutional violations was to be evaluated in terms of “present and future, not past, conditions.”<sup>133</sup> Finally, the remedy of releasing prisoners did not directly address the need to improve medical care.<sup>134</sup>

As for the State’s proposed remedies, Justice Alito believed that they were not given a fair hearing by the three-judge court. That court was not evaluating those options in the light of conditions at the time the order was issued and thus a less drastic alternative might have been viable.<sup>135</sup> Also, Justice Alito felt that the lower court was more concerned with conditions that violated public policy than with determining whether they met minimal constitutional requirements.<sup>136</sup> In addition, the court did not consider remedies that were time delayed.<sup>137</sup> Yet, the PLRA did not mandate choosing the swifter option, especially when such an option was outweighed by the impact on public safety.<sup>138</sup> In Justice Alito’s opinion, the state could have filled the vacant positions, improved their procedures, and purchased the needed supplies and equipment without releasing anyone.<sup>139</sup> This smaller “targeted program,” aimed at repair and expansion of current state facilities, seemed more achievable and less risky.<sup>140</sup> Even out-of-state transfers might have been a viable alternative forestalling the court’s resort to the final option of releasing a limited number of inmates from the two plaintiff classes.<sup>141</sup>

Citing the dangers of mass prisoner releases as “inherently risky,” Justice Alito chided the majority for its overreliance on deference when it came to assessing the public safety implications

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132. *Id.* at 1961.

133. *Id.* at 1962. This reasoning ignores the nature of information gathering. Site inspections, commission studies, statistical surveys, and official reporting are all time-consuming methods. While Justice Alito acknowledged that evidence of past violations was relevant, he offered no guidance about where to find the type of up-to-date information he would have required. *See id.* Unfortunately, there is no information system that can provide real-time prison data to the same extent as a traffic report or stock market ticker.

134. *Id.* at 1963.

135. *Id.* at 1963–64.

136. *Id.* at 1964.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 1965.

of the remedy.<sup>142</sup> Deference was not always ideal when it came to evaluating penology based on expert opinions, which were policy oriented, as compared to evaluation of raw facts.<sup>143</sup> On this point, Justice Alito noted that the increase in the California prison population had been accompanied by a drop in the violent crime rate—suggesting that crime rates may have decreased due to longer prison sentences.<sup>144</sup> Thus the opposite might also be true, and releasing more prisoners back into society could lead to a rise in the crime rate.<sup>145</sup> Forecasting a doomsday scenario, Justice Alito concluded that the overriding reliance on criminal justice policy as opposed to the PLRA’s intuitive policy that mass release orders were inherently unsafe would result in a “grim roster of victims.”<sup>146</sup>

### C. *The Appropriateness of the Majority’s Holding*

For the Supreme Court to issue a decision endorsing the seemingly drastic remedy of prison population reduction might appear to be judicial overreaching. But the majority’s opinion was consistent with the letter and intent of the PLRA.<sup>147</sup> The majority’s reasoning showed deference to statutory language and lower court findings, and it found that the release order remedy was appropriate and necessary under the PLRA’s criteria for relief.<sup>148</sup> The dissenting Justices tagged the majority decision as judicial activism because they felt that it improperly deferred to the three-

142. *Id.* at 1965–67. Justice Alito referred to the prison cap ordered by a federal court for Philadelphia’s prisons and the disastrous result of freeing thousands of inmates, after which nearly 10,000 new crimes occurred, including violent felonies. *Id.* at 1965–66. Congress had been conscious of this occurrence in the early 1990s before the PLRA was enacted. *Id.*

143. *Id.* at 1966–67.

144. *Id.*; see *supra* notes 19–22 and accompanying text for an opposing view.

145. *Plata*, 131 S. Ct. at 1967.

146. *Id.*

147. The Court’s recent decisions interpreting the PLRA have been faithful to the statute’s language and intent to curtail unmeritorious prisoner lawsuits. 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) (noting that Supreme Court cases interpreting the PLRA have been consistent with the legislative goals of limiting the number of prisoner filings and raising the quality of suits brought and that the Court has ruled against inmates in most of these types of cases).

148. See *Eighth Amendment: Prison Population Reduction Order—Leading Cases*, 125 HARV. L. REV. 261, 262 (2011) (suggesting that the holding in *Brown v. Plata* was not the result of judicial activism but adherence to the PLRA, state prison administrator realities and needs, and the record of conditions found by the three-judge court).

judge court's findings, which the dissenters deemed policymaking in disguise, and argued that the majority ignored the dangerous consequences for the public welfare.<sup>149</sup> At the same time, it appeared that the dissenters selectively disregarded the findings of the trial court and employed their own outcome-based assessment by repeatedly referring to gloomy predictions that were without foundation.<sup>150</sup>

For all of these criticisms, the majority stayed true to the scheme established in the PLRA, which contemplated the use of population limits and reduction as a remedy in the right circumstances. The majority followed the text of the statute, relied on the flexibility of the state in its approach to implementing the remedy, and relied on the record below without engaging in *de novo* review of the facts.<sup>151</sup> Approving the choice of a remedy that would order the release of a fixed percentage of prisoners rather than parsing out particular cases was the least intrusive and gave maximum discretion to prison officials in their choice of actions.<sup>152</sup>

The unrestrained overuse of imprisonment inevitably results in overcrowding, and overcrowding will always produce the catalog of mistreatment, deprivation, suffering, and death revealed in *Brown v. Plata*.<sup>153</sup> The three-judge panels convened under the PLRA are one step toward ending the cruel conditions of confinement, and a long one judging by the number of years that the *Plata* and *Coleman* plaintiffs pursued their causes.<sup>154</sup> Nonetheless, no single decision

149. See *Plata*, 131 S. Ct. at 1950–59 (Scalia, J., dissenting); *id.* at 1959–68 (Alito, J., dissenting).

150. *Id.* at 1957 (Scalia, J., dissenting) (“[The majority’s vague warning to the District Court that it should modify the injunction], if successful, would achieve the benefit of a marginal reduction in the inevitable murders, robberies, and rapes to be committed by the released inmates.”); *id.* at 1968 (Alito, J., dissenting) (“I fear that today’s decision, like prior prisoner release orders, will lead to a grim roster of victims. I hope that I am wrong. In a few years, we will see.”).

151. *Eighth Amendment: Prison Population Reduction Order—Leading Cases*, *supra* note 148, at 267–70.

152. *Id.* at 270.

153. See generally *Farmer v. Brennan*, 511 U.S. 825, 853–54 (1994) (Blackmun, J., concurring) (“The fact that our prisons are badly overcrowded and understaffed may well explain many of the shortcomings of our penal systems. But our Constitution sets minimal standards governing the administration of punishment in this country . . . and thus it is no answer to the complaints of the brutalized inmate that the resources are unavailable to protect him from what, in reality, is nothing less than torture.” (citation omitted)).

154. The main purposes of the PLRA are to allow state officials to address inmate claims before they reach the court and to filter out prisoner lawsuits to assure that only meritorious and unaddressed claims are adjudicated in federal

ordering population limits will ever adequately address the system-wide deficiencies of every prison. The solution inevitably and principally falls on legislatures to change the laws concerning incarceration<sup>155</sup> that affect local jail populations, sentencing, and early release of state prisoners and individuals held in federal detention facilities, before court dockets collapse under the weight of innumerable writs of habeas corpus.<sup>156</sup> And as the Supreme Court recognized in *Plata*, the harm to some inmates can affect all inmates due to conditions so pervasive they can only be viewed as unconstitutional punishment.<sup>157</sup>

#### IV. BEYOND *BROWN V. PLATA*: IMPLEMENTING CHANGE THROUGH REALIGNMENT

Acknowledging the fears and worst predictions of the dissenters in *Brown v. Plata*, the state has fashioned a response in which no one will be released early. Before the Supreme Court's decision was issued, California's Governor Edmund Brown signed Assembly Bill 109 (A.B. 109)<sup>158</sup> into law, which will channel non-

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courts. See *Jones v. Bock*, 549 U.S. 199, 203–04 (2007); *Woodford v. Ngo*, 548 U.S. 81, 83 (2006) (citing 42 U.S.C. § 1997e(c)). Making prison conditions transparent would serve these purposes by allowing officials throughout the criminal justice system to address problems before they reach unconstitutional levels.

155. See, e.g., *Renewing the Promise of Pretrial Justice for All*, PRETRIAL JUST. INST., <http://www.pretrial.org/symposium.html> (last visited Mar. 27, 2012) (“[T]oday . . . 500,000 people each day—two out of three of those in our local jails—are charged with nonviolent offenses but can’t afford bail. The cost to taxpayers is \$9 billion each year.”).

156. See *Brown v. Plata*, 131 S. Ct. 1910, 1956 (2011) (Scalia, J., dissenting). Justice Scalia described the need to respect the integrity of criminal sentences and compared the problematic majority ruling to the scenario of habeas corpus litigation that similarly upsets the state’s interest in the finality of convictions. *Id.* (“[H]ere, the Court affirms an order granting the functional equivalent of 46,000 writs of habeas corpus, based on its paean to courts’ ‘substantial flexibility when making these judgments.’” (citation omitted)).

157. *Id.* at 1940. Justice Kennedy pointed out that the scope of the remedy under the PLRA fit the scope of the unconstitutional conditions, and was not overbroad because it will have the collateral effect of benefitting more prisoners than in the plaintiff class. *Id.* (“Even prisoners with no present physical or mental illness may become afflicted, and all prisoners in California are at risk so long as the State continues to provide inadequate care.”).

158. See A.B. 109, 2011–12 Reg. Sess. (Cal. 2011), available at [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_0101-0150/ab\\_109\\_bill\\_20110329\\_enrolled.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0101-0150/ab_109_bill_20110329_enrolled.html) (effective date Oct. 1, 2011); *2011 Public Safety Realignment Fact Sheet*, CAL. DEP’T CORRECTIONS & REHABILITATION (Dec. 16, 2011) [hereinafter *Fact Sheet*], <http://www.cdcr.ca.gov/realignment/docs/Realignment-Fact-Sheet.pdf> (summarizing A.B. 109 and the trailer funding bills).

violent, low-level offenders, parolees, and juveniles from state to local jails. This law will prevent new low-risk criminals from entering the state system,<sup>159</sup> and as for current state prisoners, none will be released early.<sup>160</sup>

California's remedial legislation will keep inmates in state facilities from being released before their terms are up or before their parole is granted in the normal course of events. The alignment aims to staunch the flow of non-violent, non-serious, and non-sex offenders into these institutions.<sup>161</sup> By shifting responsibility to the counties, this legislative response to the Court's unprecedented decision will have an unprecedented ripple effect throughout the state's criminal justice system. Whether this local approach will be cost-effective, tamp down the crime rate, integrate with reentry efforts, and result in more humane treatment of prisoners remains to be seen.<sup>162</sup> Meanwhile, the state's Department of Corrections and Rehabilitation website has posted the equivalent of a stock ticker, publishing "Weekly Population Figures" for inmates and parolees.<sup>163</sup> This weekly census is an important first step in making the conditions of confinement transparent.<sup>164</sup>

159. See Press Release, Office of Governor Edmund G. Brown Jr., Governor Brown Issues Statement on U.S. Supreme Court Ruling (May 23, 2011), *available at* <http://gov.ca.gov/news.php?id=17046>.

160. See *Fact Sheet*, *supra* note 158, at 1, 3. According to the Fact Sheet, "No inmates currently in state prison will be transferred to county jails or released early." *Id.* at 1; see also Press Release, Office of Governor Edmund G. Brown Jr., Governor Brown Signs Legislation to Improve Public Safety and Empower Local Law Enforcement (Apr. 5, 2011), *available at* <http://gov.ca.gov/news.php?id=16964>.

161. See *Fact Sheet*, *supra* note 158, at 3.

162. See, e.g., Sharon Driscoll, *Studying Prison Realignment in Real Time*, STAN. LAW. (Oct. 28, 2011), <http://stanfordlawyer.law.stanford.edu/2011/10/studying-prison-realignment-in-real-time/>. While no official plan for studying the outcome of A.B. 109 had been included in the legislation, Professor Joan Petersilia at the Stanford Criminal Justice Center and students in the Advanced Seminar on Criminal Law & Public Policy will undertake a county-level study of the new law's effects in such areas as courtroom dispositions and county jail demographics. *Id.*

163. See *2011 Public Safety Realignment*, CAL. DEP'T CORRECTIONS & REHABILITATION, <http://www.cdcr.ca.gov/realignment/> (last visited Mar. 27, 2012).

164. The first benchmark after the Supreme Court's decision and the newly implemented state legislation has been a prison population reduction of 8,218 in the last quarter of 2011. See Defendant's December 2011 Status Report in Response to June 30, 2011 Order at 2, *Coleman v. Brown*, No. 2:90-cv-00520 LKK JFM P, No. 01-cv-01351-TEH (E.D. & N.D. Cal. Dec. 15, 2011), *available at* <http://www.cdcr.ca.gov/News/docs/December-3JC-Status-Report.pdf> (containing the status report to the three-judge court); Julie Small, *California Prison Population*

An important facet of realignment is the creation of Community Corrections Partnership (CCP) in each county.<sup>165</sup> The counties, as the new hubs of a significant portion of felons who otherwise would have entered the state prison system, will have to assume new responsibilities in this model of local state sentences, alternatives to incarceration, and reentry.<sup>166</sup> One scholar, noting the efficacy of state sentencing commissions across the country, regards the CCP as a type of sentencing commission.<sup>167</sup> Typically, sentencing commissions study and evaluate information about the prison population and recidivism rates impacted by changes in sentencing laws and practices.<sup>168</sup> Before A.B. 109 created the CCPs, the special master and receiver appointed in the prison litigation cases had filled this role.<sup>169</sup>

Under the CCP, California's fifty-eight counties will oversee the administration of sentences and how they will be carried out.<sup>170</sup> The sheriffs in charge of the local jails, some of which have been facing their own overcrowding issues, will superintend pretrial detainees, defendants convicted of misdemeanors or felonies, and parolees who violated the terms of their release.<sup>171</sup> Thus, the new downstream policy of administering justice will transform local correctional centers into one room jailhouses.<sup>172</sup> And the crowded conditions of those facilities,<sup>173</sup> like the overwhelmed state prisons,

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*Drops by 8,000 Since Realignment*, 89.3KPCC (Dec. 16, 2011), <http://www.scpr.org/news/2011/12/16/30375/california-prison-population-dropped-by-8000-since/>.

165. See *Fact Sheet*, *supra* note 158, at 2 (stating that the CCP, already authorized under California Penal Code Section 1230, will come up with recommendations to the county's Board of Supervisors on how to implement A.B. 109).

166. See *id.* at 3–4.

167. See Robert Weisberg, *California's De Facto Sentencing Commissions*, 64 STAN. L. REV. ONLINE 1, 6 (Nov. 11, 2011), <http://www.stanfordlawreview.org/online/californias-de-facto-sentencing-commissions>.

168. See *id.* at 3; see also Robert Weisberg, *How Sentencing Commissions Turned Out to Be a Good Idea*, 12 BERKELEY J. CRIM. L. 179 (2007). See generally NAT'L ASS'N SENT'G COMMISSIONS, <http://thenasc.org/> (last visited Mar. 27, 2012) (acting as a nonprofit clearinghouse on information "related to sentencing policies, guidelines and commissions").

169. Weisberg, *supra* note 167, at 4–5 (recounting California's failed attempt to create a sentencing commission).

170. *Id.* at 3–4.

171. *Id.* at 6.

172. The all-encompassing jailhouse is a truism in a culture where incarceration is the default setting for punishment. Even the idea of alternatives to incarceration presupposes that prison is the principal starting point.

173. See Richard Winton & Andrew Blankstein, *California's County Jails Struggle to House Influx of State Prisoners*, L.A. TIMES (Dec. 10, 2011), <http://articles.latimes.com/2011/dec/10/local/la-me-jails-20111210> (depicting

apparently have not been expressly factored into this remedial legislation.<sup>174</sup>

In addition to this legislative response, a recent decision shows how courts might take this post-*Plata* worldview of the criminal justice system into account. In *Thomas v. Schwarzenegger*, the inmate plaintiff filed a § 1983 civil rights complaint against the state based on the same issues as the *Brown v. Plata* class action: inadequate mental, physical, and dental services.<sup>175</sup> Considering that the class action litigation had already exposed overcrowding as the cause of these problems, Thomas bypassed the grievance procedure and went directly to court.<sup>176</sup> A summary judgment motion was filed, claiming that Thomas failed to exhaust his administrative remedies under the PLRA.<sup>177</sup> The district court took into account the Supreme Court's decision in *Brown v. Plata* and the work of the state's Little Hoover Commission<sup>178</sup> in bringing these problems to light and assigning overcrowding as their principal cause.<sup>179</sup> Therefore, the court held that the state was not in a position to claim ignorance of these inhumane conditions,<sup>180</sup> and there were

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the space problems encountered by local sheriffs faced with a substantial influx of new offenders, who otherwise would have gone to state prison, under the Supreme Court's ruling and A.B. 109); *Do the Crime, Do the Time? Maybe Not, in California: Jail Cell Shortage is Upsetting the Balance*, CAL. STATE SHERIFFS' ASS'N (June 2006), [http://www.calsheriffs.org/Documents/do\\_the\\_crime,\\_do\\_the\\_time.pdf](http://www.calsheriffs.org/Documents/do_the_crime,_do_the_time.pdf) (describing the dilapidated state of California's 460 local jail facilities and the overcrowded conditions, which have resulted in escalating pretrial and early releases to alleviate the pressures).

174. See ALLEN HOPPER ET AL., ACLU OF CAL., COMMUNITY SAFETY, COMMUNITY SOLUTIONS: IMPLEMENTING AB 109: ENHANCING PUBLIC SAFETY, SAVING MONEY AND WISELY ALLOCATING LIMITED JAIL SPACE 2 (2011), available at [http://www.aclunc.org/issues/criminal\\_justice/asset\\_upload\\_file459\\_10684.pdf](http://www.aclunc.org/issues/criminal_justice/asset_upload_file459_10684.pdf). Among the twelve recommendations for making the best of the opportunity afforded by A.B. 109, the ACLU included point number nine: "[e]nsure that jail conditions and alternative sanctions meet constitutional standards and are subjected to legal review before implementation." *Id.*; see also *Brown v. Plata*, 131 S. Ct. 1910, 1938 (2011) (stating that California officials did not pursue the potential remedy of out-of-state transfers because the *Coleman* court imposed a requirement that the conditions in the receiving institutions satisfied the Eighth Amendment).

175. *Thomas v. Schwarzenegger*, No. 2:07-CV-02310 ODW, 2011 U.S. Dist. LEXIS 110067, at \*1 (E.D. Cal. Sept. 27, 2011).

176. *Id.* at \*1-4.

177. *Id.* at \*1.

178. See *supra* note 47; *infra* note 310.

179. *Thomas*, 2011 U.S. Dist. LEXIS 110067, at \*4-5.

180. *Id.* at \*5-6 ("The court might infer that with the level of attention surrounding the *Coleman* and *Plata* class action suits, prison officials throughout the state were keenly aware that prison overcrowding was considered by some to be a major contributing factor in the prison system's inability to deliver minimally

triable issues of fact related to their deliberate indifference to those conditions.<sup>181</sup>

The most immediate impact of *Brown v. Plata* has been a change in the direction of the California penal system towards the parsimony principle.<sup>182</sup> In a state famous for such punishing and prison-inflating measures as the three-strikes law,<sup>183</sup> its legislature has embraced a sentencing scheme that attempts to limit punishment to no more than necessary in low-impact cases. The thrust of A.B. 109 has been to redistribute the penal authority to the counties and to control prison populations by diverting non-violent, non-serious, and non-sex offenders out of the prison pipeline. This step alone serves to cap the state prison punishment scheme, thus moderating the sentences formerly imposed on low-level offenders. Indirectly, the law will have a consciousness-raising effect, because from this point forward, every California judge, prosecutor, and defense attorney will be working in a justice system reshaped by a remedy for unconstitutional prison conditions.

Meanwhile, the policymakers in different criminal justice systems across the country, from the federal courts down to the local justice systems, might be inspired to look in new directions. The bud of decarceration philosophy has been espoused in *Brown v. Plata* and implemented by California's realignment plan.<sup>184</sup>

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adequate medical and mental health treatment to prison inmates. It had also been identified as a cause of increased inmate on inmate violence and posed safety concerns to staff as well. It would have been very surprising if defendants were unmindful of either of these two pieces of litigation, the consent decree where the state indicated it would reduce prison population, or the lengthy trial before the three-judge court. In fact, ignorance of these events might even be considered a deliberate indifference to the conditions of those being held in state custody.”)

181. *Id.* at \*8.

182. The parsimony principle dictates that punishments should be measured proportionate, and no more than needed, to meet the ends of sentencing (i.e., no gratuitous suffering). *See, e.g.*, 18 U.S.C. § 3553(a) (2006) (“The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.”); Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 *BUFF. CRIM. L. REV.* 307, 400–01 (2004) (discussing the “parsimony principle, on which in all cases punishment must be no more severe than necessary to achieve the relevant deterrent effect”).

183. *See* CAL. PENAL CODE § 667(e)(2) (2012); *Ewing v. California*, 538 U.S. 11, 30 (2003) (holding that California's three-strikes law, which sent a repeat offender convicted of stealing golf clubs to prison for twenty-five years to life, did not violate the Eighth Amendment); *A Primer: Three Strikes—The Impact After More Than a Decade*, CAL. LEGIS. ANALYST'S OFF. (Oct. 2005), [http://www.lao.ca.gov/2005/3\\_strikes/3\\_strikes\\_102005.htm](http://www.lao.ca.gov/2005/3_strikes/3_strikes_102005.htm).

184. In fact, there is another attempt at a ballot initiative in California that would ameliorate the impact of its three-strikes law in the wake of the realignment.

Other states might take the initiative to build on or inaugurate efforts along the lines of A.B. 109,<sup>185</sup> and to follow-up on such measures as resentencing for drug offenders serving excessive mandatory minimums.<sup>186</sup> Perhaps this viewpoint might inspire introspection on the part of society and remind everyone that in a nation of laws there are only a few degrees of separation between civilians and prisoners.<sup>187</sup>

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*See* Press Release, Debra Bowen, Cal. Sec'y of State, Three Strikes Initiative Enters Circulation (Dec. 16, 2011), *available at* <http://www.sos.ca.gov/admin/press-releases/2011/db11-063.pdf>. The success of this ballot proposal, as with realignment, will depend on the state's ability to muster the financial commitment to see it through. *See, e.g.*, Josh Richman, *Money Is Gone, but Proposition 36's Drug-Treatment Mandate Remains*, OAKLAND TRIBUNE, Feb. 22, 2011, *available at* 2011 WLNR 3472022. *See generally* Prop 36—*The Substance Abuse and Crime Prevention Act*, UCLA INTEGRATED SUBSTANCE ABUSE PROGRAMS, <http://www.uclaisap.org/prop36/index.html> (last visited Mar. 28, 2012).

185. *See, e.g.*, Chris Blank, *Changes Suggested for Missouri's Probation and Parole System*, KANSAS CITY STAR (Dec. 19, 2011, 2:48 AM), <http://www.kansascity.com/2011/12/17/3327823/changes-suggested-for-missouris.html> (discussing the Missouri Working Group on Sentencing and Corrections' recommended changes to the state's parole system, such as providing incentives for compliance, shorter or flash punishments for non-violent and technical violators, and the creation of a statewide oversight committee); Jessie Halladay, *996 Kentucky Inmates Get Out Early in New Prison Plan*, COURIER-JOURNAL (Dec. 15, 2011, 10:47 PM), <http://www.courier-journal.com/article/20111215/NEWS01/312150063/mandatory-re-entry-prisoners-kentucky?odyssey=tab|topnews|text|Local%20News> (discussing a new legislative program to grant early release and reentry support to prisoners within six-months of their maximum sentence dates; in other words, the legislative program provides a special reentry parole for inmates who otherwise would have been released with no support or supervision at the end of their terms).

186. *See, e.g.*, Press Release, Andrew Cuomo, Governor of N.Y., Governor Cuomo Announces Closure of Seven State Prison Facilities (June 30, 2011), *available at* <http://www.governor.ny.gov/press/06302011ClosureOfSevenStatePrisonFacilities> (announcing New York prison population decreases due to reforms to the Rockefeller mandatory minimum sentencing laws and due to a drop in the state's crime rate); *Drug Law Changes*, N.Y. ST. DIVISION CRIM. JUST. SERVICES, <http://www.criminaljustice.ny.gov/drug-law-reform/index.html> (last visited Mar. 29, 2012); William Gibney, *Drug Law Resentencing: Saving Tax Dollars with Minimal Community Risk*, LEGAL AID SOC'Y (Jan. 13, 2010), <http://www.legal-aid.org/media/127984/drug-law-reform-paper-2009.pdf>.

187. This is especially true since millions of people detained pretrial are presumed innocent, and those serving time behind bars or on parole or probation have connections to family, communities, and the larger society in which we all live. Some scholars have proposed that the distance between public perceptions of offenders and life in prison might be bridged by increasing the involvement of the public with prisoners. *See, e.g.*, David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 49 (2011) (suggesting that among the ways to increase empathy for prisoners and humanize offenders might be to connect them with people on the outside through joint activities such as educational or

Justice Kennedy writing for the majority in *Brown v. Plata* began his analysis with an acknowledgement of a prisoner's personhood and dignity.<sup>188</sup> This language adds an important statement to the armamentarium of rights that can survive behind prison walls.<sup>189</sup> And therefore, the ideas of personhood and dignity might act reflexively upon sentencing guidelines and trial court decisions that accept that the conditions of confinement should be a factor in sentencing.<sup>190</sup>

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similar programs). Scholars have also put forward the idea that bridging this gap may reduce recidivism. See MINN. DEP'T OF CORR., THE EFFECTS OF PRISON VISITATION ON OFFENDER RECIDIVISM 57 (2011), <http://www.doc.state.mn.us/publications/documents/11-11MNPrisonVisitationStudy.pdf>. Moreover, the demographics of arrestees and prisoners continue to change, impacting different segments of society. See, e.g., Robert Brame et al., *Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21, 25–26 (2012); Erica Goode, *Many in U.S. Are Arrested by Age 23, Study Finds*, N.Y. TIMES, Dec. 19, 2011, <http://www.nytimes.com/2011/12/19/us/nearly-a-third-of-americans-are-arrested-by-23-study-says.html> (“By age 23, almost a third of Americans have been arrested for a crime, according to a new study that researchers say is a measure of growing exposure to the criminal justice system in everyday life.”).

188. *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) (“Prisoners retain the essence of human dignity inherent in all persons.”).

189. See, e.g., *Walker v. State*, 68 P.3d 872, 882–84 (Mont. 2003). In *Walker*, the Supreme Court of Montana relied on the “human dignity” provision in the state’s constitution to address the harm to prisoners caused by behavior management plans (BMPs). See *id.* The court held that the BMPs and intolerable living conditions aggravated the prisoners’ mental health issues and violated their “inviolable” right of human dignity under article II, section 4 of the state constitution as well as section 22 (comparable to the U.S. Constitution’s Eighth Amendment). See *id.* at 886.

190. See Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 222–26 (2011) (discussing the Supreme Court’s interpretations of “dignity” as anchors for substantive interests in different contexts; and in particular “collective virtue as dignity” that underscores the need for humane treatment of prisoners under the Eighth Amendment, specifically taking into account Justice Kennedy’s observation in *Brown v. Plata*); see also HCJ 2605/05 Academic Center for Law and Business v. Minister of Finance 34 [2009] (Isr.), [http://elyon1.court.gov.il/files\\_eng/05/050/026/n39/05026050.n39.pdf](http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.pdf).

The Prisons Ordinance Amendment Law (no. 28), 5764-2004 (hereafter: ‘amendment 28’), provides that the State of Israel will establish for the first time a (single) prison that will be operated and managed by a private corporation rather than by the state. The arrangement provided in amendment 28 leads to a transfer of basic powers of the state in the field of law enforcement—imprisonment powers—the exercise of which involves a continuous violation of human rights, to a private profit-making corporation. As we shall explain below, this transfer of powers violates the constitutional rights to *personal liberty and human dignity*, which are enshrined in the Basic Law: Human Dignity and Liberty.

*Id.* (emphasis added).

## V. SMART SENTENCING: OFFENDER CLASSIFICATION AND SENTENCE ADJUSTMENT

With some arm-twisting by the federal courts, California's realignment of criminal justice policy has been implemented. This legislative response was not out of line with an undercurrent of existing decisions that have taken advantage of laws permitting sentence reductions and alternatives for vulnerable defendants. The mental status or physical condition of a defendant can serve as a defense to crime (e.g., mental disease or defect or physical incapacity) and can mitigate or eliminate punishment,<sup>191</sup> and to some extent the criminal justice system factors in the sensitivity and vulnerability of persons sent into the prison system.<sup>192</sup>

The current calculus for setting prison sentences shows the complete lack of a consistent rationale underlying penal laws. Get "tough on crime" promises, while having political caché, have exposed the inefficacy of lengthening sentences and terminating opportunities for early release, hence the "smart on crime" approach.<sup>193</sup> For example, the Wisconsin legislature has recently been embroiled over a debate on whether to cut back on early release for its prisoners.<sup>194</sup> Considering this development,

191. See generally LAFAYE, *supra* note 18, at 447–49 (discussing excuse defenses based on physical or mental disabilities); Marjorie A. Shields, Annotation, *Downward Departure Under State Sentencing Guidelines Permitting Downward Departure for Defendants with Significantly Reduced Mental Capacity, Including Alcohol or Drug Dependency*, 113 A.L.R.5TH 597 (2003); C. T. Drechsler, Annotation, Comment Note, *Mental or Emotional Condition as Diminishing Responsibility for Crime*, 22 A.L.R.3D 1228 (1968).

192. See generally Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009) (discussing the impact of incarceration on more sensitive offenders, the importance of considering subjective experiences, and the possibility of calibrating punishments).

193. See AM. BAR ASS'N, *THE STATE OF CRIMINAL JUSTICE* 3 (Myrna Raeder ed. 2010) ("One area where the recession has had a major impact is in funding the nation's correctional infrastructure. The sustained growth of the prison population has now become too expensive for a number of states to sustain, which many hope will bring a halt to the over-reliance on incarceration. The slogan that we must be 'smart on crime,' rather than tough on crime reflects this financial reality.").

194. See Malcolm C. Young, *Turning Back the Clock on Early Release*, THE CRIME REP. (June 8, 2011, 3:29 AM), <http://www.thecrimereport.org/news/inside-criminal-justice/2011-06-turning-back-the-clock-on-early-release> ("Some Wisconsin politicians opposed 'earned early release' from the start. Now, with a new governor and a shift in control in the legislature, the state's lawmakers on June 8 approved a bill repealing Early Release. Gov. Scott Walker was expected to sign the bill shortly thereafter."). The Governor signed the bill the following month.

Professor Malcolm Young observed that the fundamental problem underlying all sentencing practices was based on two main causes.<sup>195</sup> To start, prison sentence length was not based on objective analysis but rather legislative impulsiveness and instinct.<sup>196</sup> The scale of sentences required to protect the public is counterbalanced by the need to be “tough on crime” or respond to the latest anti-crime campaign.<sup>197</sup> Professor Young has also asserted that the same ill-defined criteria are relied on by judges meting out these sentences.<sup>198</sup>

When a court can dole out punishment set in thousands of years, what is the rationale underlying such an impossibility?<sup>199</sup> Why set a term of years that no human being could or should satisfy?<sup>200</sup> It renders the entire sentencing scheme chimerical.<sup>201</sup>

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See Associated Press, *Walker Signs Bill Doing Away With Early Release (Update)*, WISLAWJOURNAL.COM (July 19, 2011, 10:35 AM), <http://wislawjournal.com/2011/07/19/walker-to-sign-repeal-of-early-prison-release/>.

195. Young, *supra* note 194.

196. *Id.*

197. *Id.*

198. *Id.*

199. See, e.g., *Rapists Handed 32,500 Years in Jail*, 15 LAW. WKLY. NEWS (Ont., Can.), Apr. 26, 1996 (“Allan Wayne McLaurin and Darron Bennalford Anderson were convicted of the crimes in 1993, but that decision was overturned by the Court of Criminal Appeal because it said the trial judge erroneously instructed the jury that a defendant is ‘presumed not guilty,’ rather than ‘presumed innocent.’ In March, a nine-man, three-woman jury handed Mr. McLaurin a 21,250-year sentence, and Mr. Anderson 11,250 years. A third man is still being sought.”).

200. See, e.g., Gabriel Falcon, *‘Lipstick Killer’ Behind Bars Since 1946*, CNN (Oct. 24, 2009), [http://articles.cnn.com/2009-10-24/justice/illinois.lipstick.murders\\_1\\_leopold-and-loeb-murderer-longest-serving-inmate?\\_s=PM:CRIME](http://articles.cnn.com/2009-10-24/justice/illinois.lipstick.murders_1_leopold-and-loeb-murderer-longest-serving-inmate?_s=PM:CRIME) (“[Denied parole numerous times, William Heirens] lives in the present and hopes for a future outside prison. Supporters have championed his cause, convinced that he is innocent, or arguing that he has been rehabilitated, a model inmate who has served his sentence.”); Joseph Geringer, *In the Shadow of Bill Heirens*, TRUTV, [http://www.trutv.com/library/crime/serial\\_killers/predators/heirens/heirens\\_1.html](http://www.trutv.com/library/crime/serial_killers/predators/heirens/heirens_1.html) (last visited Mar. 28, 2012) (describing the case of an Illinois man, William Heirens, convicted of serial murder and incarcerated since 1946); see also *Texas Inmate Paroled After 60 Years*, KTXS.COM (Dec. 18, 2011, 1:10 PM), <http://www.ktxs.com/news/30024628/detail.html> (discussing Harvey Stewart, an eighty-three year old inmate who is to be released on parole after serving sixty years in prison—making him Texas’ longest serving offender. He is no longer considered a threat to society according to Corrections officials.). “When he first went to prison in 1951, gasoline was 20 cents a gallon, a postage stamp cost three pennies and Harry Truman was [P]resident.” *Id.* The fear of life in prison and its torments has on occasion overwhelmed a defendant at the sentencing stage. See, e.g., Jennifer Emily, *Man Slits His Throat in Dallas Courtroom After Judge Issues 40-Year Sentence*, DALL. MORNING NEWS (Sept. 1, 2010, 6:58 AM), <http://www.dallasnews>

Indeed, there can be no condign punishments under these laws, which leads to the problem of justifying the length and conditions of incarcerative punishment.

Carceral sentencing affects every facet of the person in the dock, their personhood<sup>202</sup> and roots in the outside world. And achieving mental toughness is no justification for incarcerative punishment. Prison life in general and solitary confinement in particular have a corrosive effect on mental wellbeing.<sup>203</sup> The fact that some persons might have the character to endure the hardships of prison life is only a rationalization for the premise that prison is appropriate for everyone. Suffering for its own sake is only another ends justifying the means argument. There is no logical or legal support for punishing people because they can take it, but there is ample authority for prohibiting invidious punishment.<sup>204</sup> To borrow a principle from tort law, the justice system must take defendants as they find them,<sup>205</sup> and the conditions of imprisonment should not be evaluated based on the

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.com/news/community-news/dallas/headlines/20100831-Man-slits-his-throat-in-Dallas-5245.ece.

201. See Steven Drizin, *Does Rehabilitation Matter Anymore? The Case of William Heirens*, BLUHM BLOG (July 31, 2007, 10:18 AM), <http://blog.law.northwestern.edu/bluhm/2007/07/index.html> (“For the past 61 years, Heirens has been fighting in the courts to establish his innocence. Although he has come close on several occasions, relief has been denied in the courts, by a succession of Governors, and by the Parole Boards. . . . He has been a model prisoner, a jailhouse lawyer who has freed many others, an accomplished painter, and was the first inmate to earn a four year college degree. Today, at age 78, Heirens is an obese diabetic who is losing his eyesight and is confined to a wheelchair. He poses no threat to anyone and is a good parole risk.”).

202. See *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) (“Prisoners retain the essence of human dignity inherent in all persons.”).

203. See Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 335 (2006); Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY L. 104, 104–05 (2010); DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (2006), <http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf>.

204. See Howard J. Alperin, Annotation, *Comment Note—Length of Sentence as Violation of Constitutional Provisions Prohibiting Cruel and Unusual Punishment*, 33 A.L.R.3D 335 (1970).

205. Cf. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 31 (2010) (“When an actor’s tortious conduct causes harm to a person that, because of a preexisting physical or mental condition or other characteristics of the person, is of a greater magnitude or different type than might reasonably be expected, the actor is nevertheless subject to liability for all such harm to the person.”).

endurance of the few, but on the harm to everyone. The physical and mental attributes ignored at sentencing and exacerbated by prison conditions are subjecting thousands to penalties far in excess of those intended by legislatures, or permitted by the constitution.

The Eighth Amendment by its terms is concerned with punishment and not conditions of confinement.<sup>206</sup> However, those conditions can become punitive when there is a serious deprivation and deliberate indifference to suffering behind bars.<sup>207</sup> This is the fundamental truth acknowledged by Justice Kennedy in *Brown v. Plata*: “To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison’s failure to provide sustenance for inmates ‘may actually produce physical torture or a lingering death.’”<sup>208</sup> Thus, when the State defaults on its obligation, the courts are obligated to address the State’s failure.<sup>209</sup>

Judges are also part of the continuum of a justice system whose endpoint is the carceral state. There is an unbroken line from arrest to judgment to punishment, putting some of the responsibility on the criminal courts’ sentencing practices.<sup>210</sup> The criminal trial judge’s role is confined to setting a term of years with studied indifference to the conditions imposed by delegating to the jailer its total administration.<sup>211</sup> Conditions of confinement can become a categorical punishment as exemplified in *Brown v. Plata*.

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206. See Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 885 (2009) (“[I]n the existing system, the crime determines only the length of the prison sentence, not the conditions under which that sentence will be served. Indeed, any harm prisoners suffer at the hands of the state while incarcerated is typically wholly unrelated to their original offense.” (footnote omitted)).

207. *Id.* at 891–92 (suggesting that the state has an affirmative duty to protect the incarcerated since it is the state that confined them and since the government, through legislative and regulatory policies, helped to create this hazardous environment, and therefore must bear the “carceral burden”).

208. *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)).

209. *Id.* at 1928–29.

210. See Dolovich, *supra* note 206, at 900–01.

211. *Id.* at 978 (“Just as prison officials learn cruelty through repeated exposure to prisoners in a context that denies their shared humanity, judges develop a cruel disposition toward prisoners through the repeated demand that they validate as not cruel conditions that are clearly at odds with the state’s carceral burden.”).

At this point, civil rights litigation forces another court to step in and define the proper conditions for incarceration. The question is why punishment is bifurcated in this way. It results in excessive punishment for the incarcerated and added administrative and financial burdens for the State to correct problems that could have been addressed at sentencing.<sup>212</sup>

In view of the conditions engrained in prison life,<sup>213</sup> judges sometimes exercise their discretion to adjust sentences in individual cases to balance the equities. Perhaps anticipating the realignment concept that California has been compelled to embrace, some judges have recognized that the conditions of confinement amount to a punishment that might fall within the proscription of the Eighth Amendment as applied to sentencing.<sup>214</sup>

The prison experience and its conditions can be treated as a mitigating sentencing factor for susceptible or vulnerable individuals.<sup>215</sup> There have been exceptions where a sentencing

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212. *Cf. Overton v. Bazzetta*, 539 U.S. 126, 140 n.\* (2003) (Thomas, J., concurring) (“A prisoner’s sentence is the punishment imposed pursuant to state law. Sentencing a criminal to a term of imprisonment may, under state law, carry with it the implied delegation to prison officials to discipline and otherwise supervise the criminal while he is incarcerated. Thus, restrictions imposed by prison officials may also be a part of the sentence, provided that those officials are not acting ultra vires with respect to the discretion given them, by implication, in the sentence.”).

213. *See, e.g., Cox v. Turley*, 506 F.2d 1347, 1350 (6th Cir. 1974) (“Courts take judicial notice that a general prison population includes criminals of all types, young and old, dangerous, of every character. And the courts also particularly take judicial notice that it is not uncommon to find the indiscriminate mixing of hardened criminals, including sexual assaulters, with young offenders.”); *United States v. Gallo*, 653 F. Supp. 320, 336 (E.D.N.Y. 1986) (“In this district, defendants are detained prior to and during trial in the Metropolitan Correction Center, alongside criminals incarcerated subsequent to conviction pursuant to due process of law. Overcrowded conditions were observed by this court in the course of its inspection of the Center. Visiting hours and recreation are quite restricted. Moreover, opportunities to meet with counsel and to examine tapes and written documents, and to assist in preparation for trial, are severely limited. The court may take judicial notice of such prison conditions affecting the administration of justice.”).

214. *See Schneider, supra* note 11, at 10–12 (examining the common factors that state courts with a body of “proportionality jurisprudence” have developed to adjust sentences that are out of step with the principles of fair punishment); Kennard R. Strutin, *Mandatory Minimums, Life Sentences and the Eighth Amendment*, N.Y. St. B.J., Nov. 1994, at 6.

215. *See Schneider, supra* note 11, at 19 (noting that one of the proportionality factors that courts have considered is the defendant’s criminal history, which might be characterized as a “worthiness factor”). The defendant’s “worthiness” for sentencing consideration is broader than his rap sheet. Thus, the concepts of

guideline recognizes or a sentencing judge has recognized the “cruel and unusual” nature of prison by adjusting the punishment of particular offenders or taking into account the effects of the conditions of confinement on susceptible defendants.<sup>216</sup> Indeed, it is these exceptions that provide the foundation for a reconceptualization of incarcerative punishment catalyzed by the California realignment example. The State of California reinvented its sentencing laws in response to its prison population problem, thereby informing and educating everyone in the criminal justice system that conditions of confinement do matter in setting punishment. They siphoned away non-violent, non-serious, and non-sex offenders from state prison facilities. While their rationale was formulated to satisfy a court-ordered population reduction, the reality is a recognition that some persons should not be sentenced to state prison or any prison. This conclusion has already been reached by federal and state courts by taking into account the “individual” character of the man or woman in the dock and cognizance of the nature of the prison environment.

Federal law recognizes that there is room for individualized sentencing to arrive at an appropriate sentence.<sup>217</sup> Information that might reveal a defendant’s vulnerability inside prison is especially important at the pretrial stage. One of the factors in setting a penalty is whether the prison facility can provide a defendant with adequate medical care.<sup>218</sup> The level of health care available and the conditions of prison life should be determinative in the length of an incarcerative sentence due to their impact on

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dignity and personhood, which go beyond his criminal background or vulnerability to harm, are facets that ought to be encompassed in a worthiness factor analysis. See discussion *supra* notes 188–90 and accompanying text.

216. See Kolber, *supra* note 192, at 193–95; see, e.g., Lise Olsen, *Former Federal Judge Kent Calls Prison Unfair, ‘Cruel’*, CHRON.COM (Aug. 3, 2010, 5:30 AM), <http://www.chron.com/news/houston-texas/article/Former-federal-judge-Kent-calls-prison-unfair-1718673.php> (“As a prisoner, former U.S. District Judge Samuel B. Kent has been shunted into solitary confinement, forced to hear the screams of another inmate being raped and ordered by a ‘cruel’ sergeant in the Florida prison system to do calisthenics in the nude, according to allegations in a federal court memorandum filed Tuesday. Kent has requested that his 33-month sentence be vacated and adjusted based on his allegations of inhumane and unfair treatment.”).

217. See 18 U.S.C. § 3661 (2006) (“No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”).

218. See 18 U.S.C. § 3553(a)(2)(D) (2006).

the defendant,<sup>219</sup> as prison has the potential of transforming routine medical matters into the extraordinary by virtue of the conditions inside.

One author has cataloged the variety of ailments and medical conditions that have justified deviation from the formerly mandatory Federal Sentencing Guidelines.<sup>220</sup> And yet, the Guidelines' downward departures were seldom invoked for these reasons.<sup>221</sup> After a series of cases dethroned the Guidelines, the issue of a defendant's physical condition as an element of sentencing has been litigated case-by-case.<sup>222</sup> Still, it is through the lessons garnered from these individual cases that reforms in the sentencing guidelines and procedures might find fruition.<sup>223</sup>

Ultimately, policymakers have forced the courts to resolve the tension between improving prison conditions and making exceptions under the sentencing laws in individual cases, forestalling the need for widespread reforms.<sup>224</sup> California has

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219. See generally Penelope June Weller, *The Right to Health: The Convention on the Rights of Persons with Disabilities*, 35 ALTERNATIVE. L.J. 66 (2010), available at <http://ssrn.com/abstract=1935746> (discussing the Australian government's positive obligation to respect, protect, and fulfill the right to health of people in custody).

220. See Stacey M. Studnicki, *Individualized Sentencing: Federal Sentencing Departures Based Upon Physical Condition*, 1994 DET. C.L. REV. 1215, 1224, 1233-41 (1994).

221. *Id.* at 1217-18.

222. See generally Eric C. Surette, Annotation, *Downward Departure Under § 5H1.4 of United States Sentencing Guidelines (U.S.S.G.) Permitting Downward Departure for Extraordinary Physical Impairment*, 16 A.L.R. FED. 2D 113 (2007) ("The fact that a defendant has an illness, disease, or condition by itself does not constitute an extraordinary physical impairment. It is the extent to which the illness, disease, or condition has progressed, and the extent to which the Bureau of Prisons has the medical personnel and facilities required to furnish a defendant with the care and treatment he or she needs that will generally control.").

223. Studnicki, *supra* note 220, at 1245 (footnote omitted) ("If courts fail to depart on the belief that a departure is not permissible, the Sentencing Commission may interpret this 'judicial inaction as endorsement of the appropriateness of the sentences scheduled under the Guidelines.' In order to guide future Guidelines' amendments, the courts are obligated to create a record so the Commission may see that departures, especially on the basis of individualized factors, are appropriate and necessary.").

224. See generally Alice Ristroph, *Model Penal Code Symposium: How (Not) to Think Like a Punisher*, 61 FLA. L. REV. 727 (2009) (discussing Model Penal Code approaches to sentencing and the need for a judge-centered pragmatic sentencing approach unshackled by retributivist (punishment) policies); Simon N. M. Young, *Justifying Sentencing Discounts for Foreigners*, 31 H.K. L.J. 369 (2001) (discussing the hardships experienced by foreign defendants serving time in Hong Kong jail as a factor in sentence mitigation, which should be accommodated through a

chosen a third approach by staunching the flow of offenders into the state prison system and moving them into the local jail system, using home monitoring, or utilizing other alternative avenues, and despite the Supreme Court's order, has avoided releasing current state prisoners or even transferring them to local facilities.<sup>225</sup> Pursuing a realignment approach to its fullest extent, in order to avoid the unconstitutional consequences of overcrowding in state prisons, could lead to a system where every individual facing incarceration would receive a medical and mental evaluation as part of the presentence report preparation and could introduce expert testimony at a sentencing hearing to advise the court about the best disposition and placement (classification) of that *individual* within the penal system or a non-carcerative alternative.<sup>226</sup>

The conditions in prison are also reflected, perhaps intensified, in the local jails where defendants are held temporarily awaiting disposition, serve short sentences, and await transfer to prison for longer terms.<sup>227</sup> As noted earlier, this might become an important factor in the implementation of California's realignment plan, which calls for extensive reliance on local facilities in lieu of state prisons.

The catalog of issues in local jails touches all aspects of an inmate's life, much as it would in state prisons. One challenge faced by inmates is the conundrum facing large persons due to the inadequacy of the jailhouse diet and the difficulty of inhabiting cramped living spaces.<sup>228</sup> In Arkansas, an inmate awaiting trial filed

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proportionality analysis).

225. See *Get Ready, California Counties, Here Come the Inmates*, L.A. TIMES (Aug. 30, 2011), <http://articles.latimes.com/2011/aug/30/realestate/la-ed-re-entry-20110830> (observing that rehabilitation and reentry get little attention as California counties struggle with the financial consequences of the new legislative mandate to route more prisoners through local jails and community facilities).

226. See generally Gregory G. Sarno, Annotation, *Admissibility of Expert Testimony as to Appropriate Punishment for Convicted Defendant*, 47 A.L.R.4TH 1069 (1986) (analyzing state and federal cases that discuss the admissibility of expert or psychiatric testimony affecting criminal sentencing).

227. See TODD D. MINTON, JAIL INMATES AT MIDYEAR 2010—STATISTICAL TABLES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim10st.pdf> (describing national jail populations and the various purposes served by incarceration in local facilities (e.g., awaiting trial or disposition, temporary holding for parole and probation violators, or serving short-term sentences)).

228. See Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 687–88 (1993) (collecting decisions where the problematic living conditions in jails, as well as prisons, have been litigated); Lizette Alvarez, *Soy Diet Is Cruel and Unusual, Florida Inmate Claims*, N.Y. TIMES, Nov. 12, 2011, at A13; Tovin

a lawsuit claiming that the detention center diet was so deficient that he was “literally being starved to death.”<sup>229</sup> Physical or mental issues can render someone unfit for prison because he is already confined by his body or mind.<sup>230</sup>

Vulnerability to cruel punishment, a front-end Eighth Amendment argument, reflects the fears and realities of prison conditions present in all cases and acknowledged by the Court in *Plata*. These are chronic conditions faced by inmates and those to be sentenced to incarceration. Thus, legislatures might account for, a court could take judicial notice of, or a defense lawyer might raise awareness of, the full spectrum of prison life: susceptibility to abuse;<sup>231</sup> sexual abuse and rape;<sup>232</sup> poor living conditions;<sup>233</sup>

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Lapan, *When Inmates Act Out, the Loaf Is Served*, SANTA CRUZ SENTINEL (Dec. 17, 2010, 6:54 PM), [http://www.santacruzsentinel.com/rss/ci\\_16886434](http://www.santacruzsentinel.com/rss/ci_16886434) (describing correctional officials’ use of “disciplinary diet loaf, prison loaf and management loaf” to punish misbehaving inmates).

229. See *300-Pound Inmate Complains Ark. Jail Doesn’t Feed Him Well*, USA TODAY (Apr. 28, 2008, 10:55 AM), [http://www.usatoday.com/news/topstories/2008-04-28-2668992449\\_x.htm](http://www.usatoday.com/news/topstories/2008-04-28-2668992449_x.htm) (“Broderick Lloyd Laswell says he isn’t happy that he’s down to 308 pounds after eight months in the Benton County jail. He has filed a federal lawsuit complaining the jail doesn’t provide inmates with enough food. . . . ‘If we are in a small pod all day (and) do next to nothing for physical exercise, we should not lose weight,’ the suit says. ‘The only reason we lost weight in here is because we are literally being starved to death.’”). However, under the federal sentencing guidelines in the United States, morbid obesity does not automatically qualify as an “extraordinary physical impairment” for a downward departure under U.S. Sentencing Guidelines Manual § 5H1.4. See, e.g., *United States v. Washington*, 467 F.3d 1122 (8th Cir. 2006) (denying an application for downward sentence departure based on the defendant’s weight loss from about 800 pounds at arrest to 574 pounds at sentencing).

230. See, e.g., Paul Sims, *Agoraphobic Who Made So Much in Benefits He Ran Illegal Loans Business Escapes Trial Because He’s ‘Scared To Leave His House’*, MAILONLINE (June 22, 2011), <http://www.dailymail.co.uk/news/article-2006390/Middlesborough-man-Colin-Watson-got-benefits-cash-lent-friends-escapes-trial-hes-scared-leaving-home.html> (“His agoraphobia was said to be so bad he cannot leave his one-bedroom home to go to court and the case against him was reluctantly dropped by Judge Peter Fox, QC.”).

231. See, e.g., *United States v. Parish*, 308 F.3d 1025, 1031 (9th Cir. 2002) (“A defendant’s unusual susceptibility to abuse by other inmates while in prison may warrant a downward departure. The district court found that Parish was susceptible to abuse in prison because of a ‘combination’ of factors: ‘his stature, his demeanor, his naivete, [and] the nature of the offense.’” (citations omitted)).

232. See generally OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, *DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES* (2005), available at <http://www.justice.gov/oig/special/0504/final.pdf> (critiquing the deficiencies in federal laws criminalizing prison staff sexual relations with inmates); ALLEN J. BECK ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008–09* 6 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf> (“Among the 76,459

psychological harm;<sup>234</sup> geriatric related problems;<sup>235</sup> and inhumane treatment by officials.<sup>236</sup> Other illustrative bases for exceptions to incarcerative punishment and acknowledgement of the conditions of confinement have been found in the following areas: sexual targets;<sup>237</sup> sexual orientation and gender reassignment;<sup>238</sup> ability to

inmates participating in the NIS-2 sexual victimization survey, 2,861 reported experiencing one or more incidents of sexual victimization in the past 12 months, or since admission to the facility, if less than 12 months.”).

233. See, e.g., David B. Caruso, *Anne Hathaway's Ex-Boyfriend Not Enjoying Prison*, SEATTLE TIMES (Nov. 13, 2008, 11:22 AM), [http://seattletimes.nwsources.com/html/entertainment/2008386905\\_apvaticamscafollieri.html](http://seattletimes.nwsources.com/html/entertainment/2008386905_apvaticamscafollieri.html) (“[Raffaello] Follieri’s lawyer sent a letter to a judge this week complaining about the facility. ‘Mr. Follieri reports that he is in a windowless dormitory with approximately 120 other men,’ the letter said. ‘He says that he cannot eat because the food appears to be spoiled and that the toilet and shower facilities are unspeakably unsanitary[,] e.g., there is excrement in the shower and rats are roaming freely in the area. He says the stench is intolerable.’ The lawyer, Flora Edwards, said things are so bad, it has made Follieri ill. So far he has had a fever, blood in his urine, intestinal problems and shortness of breath. Edwards asked the judge to have the 30-year-old transferred back to the federal jail in Manhattan where he was previously held. The judge asked the government to look into Follieri’s complaints.”).

234. See Jeffrey Kluger, *Are Prisons Driving Prisoners Mad?*, TIME (Jan. 26, 2007), <http://www.time.com/time/magazine/article/0,9171,1582304,00.html> (“The U.S. holds about 2 million people under lock and key, and 20,000 of them are confined in the 31 supermaxes operated by the states and the Federal Government. That may represent only 1% of the inmate population, but it’s a volatile 1%. Push any punishment too far and mental breakdown—or at least a claim of mental breakdown—is sure to follow.”).

235. See generally John D. Burrow & Barbara A. Koons-Witt, *Elderly Status, Extraordinary Physical Impairments and Intercircuit Variation Under the Federal Sentencing Guidelines*, 11 ELDER L.J. 273 (2003) (proposing that prisoners’ elderly status be considered as part of the Federal Sentencing Guidelines); Timothy Curtin, *The Continuing Problem of America’s Aging Prison Population and the Search for a Cost-Effective and Socially Acceptable Means of Addressing It*, 15 ELDER L.J. 473 (2007) (evaluating the challenges of accommodating elderly inmates).

236. See, e.g., *Morris v. Zefferi*, 601 F.3d 805, 807 (8th Cir. 2010) (involving a § 1983 action filed by a pretrial detainee against local sheriff for transporting him from the court to the jail in a dog cage in a K-9 vehicle); *Johnson Frees Woman Abused by Jail Guards*, FREE REPUBLIC (May 31, 2002, 12:53 PM), <http://www.freerepublic.com/focus/f-news/692629/posts> (“Gov. Gary Johnson took the rare step Thursday of commuting the six-year sentence of an inmate—a woman sexually assaulted by Doña County jail guards while incarcerated for credit-card fraud.”).

237. See, e.g., *Jail a Risk for Thin, White Man, Judge Rules*, FLA. TIMES-UNION, Jan. 7, 2001, at B-5 (“Hillsborough County Judge Florence Foster sent Paul Hamill, 41, to a treatment center and put him on two years’ probation. He was being sentenced for violating probation on a previous cocaine conviction. ‘He’s a small, thin, white man with curly dark hair, and I suspect he would certainly become a sexual target in the Florida state prison system,’ Foster said, according to a transcript of the November sentencing hearing. ‘I’ve been told they can’t protect people like that. I’m not going to send a man like this to Florida state prison.”).

pay;<sup>239</sup> costs of incarceration;<sup>240</sup> youth;<sup>241</sup> physical challenges;<sup>242</sup>

That is cruel and unusual punishment in my book,' she said."); *see also* Robert Gavin, *Cruel, but Not Unusual*, TIMES UNION, Mar. 28, 2010, at A1, *available at* <http://albarchive.merlinone.net/mweb/wmsql.wm.request?oneimage&imageid=10070757> ("Behind the walls of Great Meadow Correctional Facility, less than 75 miles from the state Capitol, an old stereotype remains hauntingly true: Go to prison, risk rape. The maximum-security lockup in Washington County ranked fifth worst nationwide in the most recent study of the prevalence of sexual assault in U.S. prisons—and convicted criminals housed there were only part of the problem."). *See generally* United States v. Gonzalez, 945 F.2d 525, 525–26 (2d Cir. 1991) ("At sentencing, the court found that Gonzalez had a 'feminine cast to his face and a softness of features which will make him prey to the long-term criminals with whom he will be associated in prison.' Relying on our decision in *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990), which held that 'extreme vulnerability of a criminal defendant is a proper ground for departure,' the court concluded that a downward departure was appropriate to ensure Gonzalez's safety, and therefore reduced Gonzalez's sentence to one-third of the normally applicable minimum term." (citation omitted)).

238. *See, e.g., Jail for Gay, Transgender Inmates to Close*, USA TODAY (Dec. 29, 2005, 7:05 PM), [http://www.usatoday.com/news/nation/2005-12-29-rikers-inmates\\_x.htm](http://www.usatoday.com/news/nation/2005-12-29-rikers-inmates_x.htm) ("One of the nation's few jail dormitories specifically for gay or transgender prisoners is closing on Rikers Island, prompting complaints from some activists who say it is a needed safe haven."); Purna Nemani, *Woman Locked in a Men's Prison*, COURTHOUSE NEWS SERVICE (Dec. 8, 2010), <http://www.courthousenews.com/2010/12/08/32413.htm> ("A hermaphrodite who underwent surgery to become a woman claims Hawaii incarcerated her in a men's prison where she was, predictably, raped. The 33-year-old woman says the state locked her up in its largest men's prison despite her repeated protests during intake that she is a woman."); Tom Whitehead, *Transsexual Prisoner Wins Right to Be in Female Prison*, THE TELEGRAPH (Sept. 4, 2009, 1:35 PM), <http://www.telegraph.co.uk/news/uknews/law-and-order/6138325/Transsexual-prisoner-wins-right-to-be-in-female-prison.html> ("Lawyers for the 27-year-old inmate, who is still at the preoperative stage, described her as a 'woman trapped inside a man's body' and argued keeping her among men was preventing her from having a full sex change.").

239. *See, e.g., Jennifer Steinhauer, For \$82 a Day, Booking a Cell in a 5-Star Jail*, N.Y. TIMES (Apr. 29, 2007), <http://www.nytimes.com/2007/04/29/us/29jail.html?pagewanted=all> ("For roughly \$75 to \$127 a day, these [California] convicts—who are known in the self-pay parlance as 'clients'—get a small cell behind a regular door, distance of some amplitude from violent offenders and, in some cases, the right to bring an iPod or computer on which to compose a novel, or perhaps a song."). *See generally* Symposium, *Pay-to-Stay Programs in Correctional Facilities*, 106 MICH. L. REV. FIRST IMPRESSIONS 55 (2007), <http://www.michiganlawreview.org/assets/fi/106/paytostay.pdf>.

240. *See, e.g., Monica Davey, Missouri Tells Judges Cost of Sentences*, N.Y. TIMES (Sept. 18, 2010), <http://www.nytimes.com/2010/09/19/us/19judges.html?pagewanted=all> ("For someone convicted of endangering the welfare of a child, for instance, a judge might now learn that a three-year prison sentence would run more than \$37,000 while probation would cost \$6,770. A second-degree robbery, a judge could be told, would carry a price tag of less than \$9,000 for five years of intensive probation, but more than \$50,000 for a comparable prison sentence and parole afterward. The bill for a murderer's 30-year prison term: \$504,690.");

stature;<sup>243</sup> coercive nature of pretrial detention;<sup>244</sup> and family ties.<sup>245</sup>

Jennifer Medina, *In California, a Plan to Charge Inmates for Their Stay*, N.Y. TIMES (Dec. 11, 2011), <http://www.nytimes.com/2011/12/12/us/in-riverside-california-a-plan-to-charge-inmates.html> (“Soon, a twin metal bunk at the county jail, with meals served on plastic trays, will run \$142.42.”); *see also* Annual Determination of Average Cost of Incarceration, 76 Fed. Reg. 57,081 (proposed Sept. 15, 2011), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2011-09-15/pdf/2011-23689.pdf> (containing the Department of Justice’s average cost of incarceration for the year 2010); Lynn S. Branham, *Follow the Leader: The Advisability and Propriety of Considering Cost and Recidivism Data at Sentencing*, FED. SENT’G REP. (forthcoming 2012), *available at* <http://ssrn.com/abstract=1963506> (advocating for judges taking financial costs into consideration when sentencing); Chad Flanders, *Cost as a Sentencing Factor: A Theoretical Inquiry*, (Saint Louis Univ. Legal Studies Research, Working Paper No. 2011-23, 2011), *available at* <http://ssrn.com/abstract=1920274> (discussing whether Missouri judges should take the cost of incarceration into consideration when sentencing).

241. *See, e.g.*, *United States v. C.R.*, 792 F. Supp. 2d 343, 348 (E.D.N.Y. 2011) (“This case illustrates some of the troubling problems in sentencing adolescents who download child pornography on a file-sharing computer service. Posed is the question: To protect the public and the abused children who are shown in a sexually explicit manner in computer images, do we need to destroy defendants like C.R.?”).

242. *See, e.g.*, Dan Herbeck, *Quadriplegic Spared Prison in Child Porn Case*, BUFFALONEWS.COM (Aug. 20, 2010, 6:42 PM), <http://www.buffalonews.com/incoming/article130071.ece> (“43-year-old Allegany County man who was using a credit card to buy images from child porn Web sites: Schifelbine is a quadriplegic. He cannot walk, requires 24-hour nursing care and spends all his time in his bed or wheelchair. After hearing about his physical disabilities, U. S. Attorney Terrance P. Flynn decided to offer the Belmont man an agreement that would carry no criminal conviction or prison time. Schifelbine, however, will forfeit \$50,000 to the federal government and his use of the Internet will be restricted.”).

243. *See, e.g.*, *State v. Thompson*, 735 N.W.2d 818, 830 (Neb. Ct. App. 2007) (“Thompson stands 5 feet 2 inches tall and weighs 125 to 130 pounds. Thompson’s size and how that ‘physical condition’ will affect him in a prison setting is a relevant consideration. However, given other matters found in the PSI, which matters we will detail shortly, we have no doubt that Thompson’s physical stature, although specifically mentioned, was but a minor point in the trial court’s sentencing decision.”); Scott Bauer, *Sentence for Short Sex Offender Draws Fire*, WASH. POST (May 26, 2006, 10:50 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/26/AR2006052600177.html> (“Cheyenne County District Judge Kristine Cecava . . . told Richard W. Thompson that his crimes deserved a long prison sentence but that he was too small to survive in a state prison. Joe Mangano, secretary of the National Organization of Short Statured Adults, agreed with the judge’s assessment that Thompson would face dangers while in prison because of his height.”).

244. *See, e.g.*, *United States v. Joyeros*, 204 F. Supp. 2d 412, 417 (E.D.N.Y. 2002) (“This case illustrates the danger of due process violations by intensive pressure on defendants to plead guilty because of lengthy pretrial incarcerations and the offer of advantageous deals for lesser terms of imprisonment.”); *United States v. Francis*, 129 F. Supp. 2d 612, 616 (S.D.N.Y. 2001) (citation omitted) (“Although departures based on conditions of confinement are not encouraged by the Guidelines, they also are not discouraged; in fact, conditions of confinement is an

This proliferation of problems argues in favor of a general realignment like the one pursued in California. Indeed, these individual issues cumulatively reflect the need to broadly realign sentencing to avoid punitive conditions in federal and state prisons. Thus, new policies ought to broadly and consistently allow for the consideration of individual risk factors in conjunction with the disclosure and consideration of prison conditions at the sentencing stage.<sup>246</sup>

#### VI. EFFECTUATING THE EXPOSURE AND CONSIDERATION OF THE CONDITIONS OF CONFINEMENT

While not everyone will have the same prison experience, they will face the same conditions upon arrival. And those conditions are a direct result of the sentence imposed. As the cases below illustrate, judges have little or no power to affect those conditions. Until there is a merger between the penal law governing punishment and the corrections statutes superintending prison administration, judges can only set and pronounce numerical sentences.<sup>247</sup> Ultimately, the better policy might involve the

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unmentioned factor . . . .Therefore, conditions of confinement below those in federal institutions provide grounds for a departure under U.S.S.G. § 5K2.0.”).

245. See, for example, the cases collected in *United States v. Bailey*, 369 F. Supp. 2d 1090, 1101–03 (D. Neb. 2005) (“Thus, although family ties are ordinarily not relevant, once in a great while they provide a reason for a reduced sentence.”).

246. The intensity of punishment should be considered for particular cases such as victim-defendants—for example, victims of domestic violence who in turn have been charged with crimes against their abusive spouses or partners. According to one study the majority of incarcerated women are “survivor-defendants.” See, e.g., CORNELL UNIV. LAW SCH. AVON GLOBAL CTR. FOR WOMEN AND JUSTICE & THE WOMEN IN PRISON PROJECT OF THE CORRECTIONAL ASS’N OF N.Y., FROM PROTECTION TO PUNISHMENT: POST-CONVICTION BARRIERS TO JUSTICE FOR DOMESTIC VIOLENCE SURVIVOR-DEFENDANTS IN NEW YORK STATE (2011), available at <http://www.lawschool.cornell.edu/womenandjustice/upload/From-Protection-to-Punishment-Report.pdf> (addressing the injustices victim-defendants face within the legal system). This has led to the introduction of legislation in New York to adjust the sentence to fit the offender (i.e., institutionalized leniency). See S. Res. 5436, 2011 Gen. Assemb., Reg. Sess. (N.Y. 2011), available at <http://m.nysenate.gov/legislation/bill/S5436-2011> (relating to sentencing and resentencing in domestic violence cases); *Shorter Prison Time Sought for Abused Women in NY*, LONGISLANDPRESS.COM (June 13, 2011), <http://www.longislandpress.com/2011/06/13/shorter-prison-time-sought-for-abused-women-in-ny/>. This is the first legislation of its kind to remove impediments to sentencing that have not been remedied by clemency grants or early release on parole.

247. See discussion *supra* Part V.

consultation with or appointment of special sentencing counsel<sup>248</sup> or requirement of a corrections consultant as in death penalty cases<sup>249</sup> where the sentence plays a central role. However, that policy must begin with legislation that empowers and enables trial judges to be informed about the effects of the prison sentences that they impose. Such a policy should give judges reasonable discretion to modify that sentence or have input into a defendant's classification within the correctional system, as the realignment approach discussed above would allow. The interconnectedness of penal sentences and prison conditions might best be shown by examining interactions between courts and correctional authorities as judges attempt to consider the prison environment in determining how a defendant ought to serve his or her time.<sup>250</sup>

#### A. *Judges and Jailers*

In 1983, Ernesto "Tony" Insignares was indicted for selling less than two ounces of cocaine to an undercover New York City police officer.<sup>251</sup> The judge released him on \$200.00 bail.<sup>252</sup> At trial, Insignares took the witness stand and claimed that he was only

248. See, e.g., *Padilla v. Kentucky*, 130 S. Ct. 1473, 1494 (2010) (Alito, J., concurring) ("When a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an *immigration specialist* if the client wants advice on that subject." (emphasis added)); Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461 (2011) (exploring the rights to specialized counsel in deportation cases); STEERING COMM. OF THE N.Y. IMMIGRATION REPRESENTATION STUDY REPORT ET AL., ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN IMMIGRATION PROCEEDINGS 6-14 (2011), available at [http://www.cardozolawreview.com/content/denovo/NYIRS\\_Report.pdf](http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf).

249. See generally Gregory G. Sarno, Annotation, *Admissibility of Expert Testimony as to Appropriate Punishment for Convicted Defendant*, 47 A.L.R.4TH 1069 (1986) (discussing the admissibility for sentencing purposes of expert evidence on circumstances of dangerousness); Jules Epstein, *Mandatory Mitigation: An Eighth Amendment Mandate to Require Presentation of Mitigation Evidence, Even When the Sentencing Trial Defendant Wishes to Die*, TEMP. POL. & CIV. RTS. L. REV. (forthcoming), available at <http://ssrn.com/abstract=1928052>.

250. See Schneider, *supra* note 11, at 29. Legislatures cannot predict the innumerable ways that penal and sentencing laws might be applied, resulting in some contradictory and conflicting outcomes, but a law that empowered judges to take proportionality into account would go a long way toward addressing this conundrum. *Id.*

251. See *People v. Insignares*, 470 N.Y.S.2d 513, 515 (N.Y. Sup. Ct. 1983).

252. *Id.*

delivering the package on behalf of a friend, his co-defendant, and was unaware that it contained illegal drugs.<sup>253</sup> Nonetheless, the jury convicted him of criminal sale of a controlled substance in the second degree.<sup>254</sup> At this point, presiding Justice Hornblaw remanded Insignares to Rikers Island until sentencing as was required by law.<sup>255</sup> Based on his observations of the defendant during trial, the judge became concerned about Insignares' ability to endure jail, so he ordered the correction officers to place him in administrative segregation and on a suicide watch.<sup>256</sup>

Once in Rikers Island, the defendant was placed in a holding pen along with two dozen other inmates.<sup>257</sup> Insignares picked out a corner of the cell and went to sleep.<sup>258</sup> Soon after, he was sexually assaulted by five other prisoners who also threatened his life should he reveal what happened.<sup>259</sup> At his next court appearance several days later, Insignares told the court about it, as well as a failed suicide attempt after the attack.<sup>260</sup> Confirming these claims, Justice Hornblaw was disturbed that the New York Department of Corrections had ignored his custody orders.<sup>261</sup> They believed the court exceeded its authority over a matter solely within the bailiwick of prison administration.<sup>262</sup>

A turf war broke out. The court ordered Insignares transferred to Bellevue Hospital for observation; however, the Commissioner of Corrections obtained a superseding order from the administrative judge to keep the defendant in Rikers Island Hospital.<sup>263</sup> Discovering the change in his orders, Justice Hornblaw visited the defendant at Rikers and reviewed the scene of his earlier attack.<sup>264</sup> Meanwhile, Insignares' attorney filed a *Clayton* motion<sup>265</sup>

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253. *Id.*

254. *Id.*

255. *Id.*; N.Y. CRIM. PROC. LAW § 530.40(3) (2011).

256. *Insignares*, 470 N.Y.S.2d at 515.

257. *Id.* at 516.

258. *Id.*

259. *Id.* ("Two of the inmates silenced and held him down on the floor while the other three forcibly sodomized him anally.")

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* A Clayton motion appeals to the discretionary power of the criminal court to dismiss an indictment "in furtherance of justice." N.Y. CRIM. PROC. LAW § 210.40(1) (2011). It is an equitable option that allows the court to dismiss a case even where no reason exists "as a matter of law." *Id.* To rectify an injustice

to dismiss the conviction against him in the interests of justice based on the sexual assault in *Rikers*.<sup>266</sup> The court conducted an exhaustive hearing that produced more than 2,100 pages of transcripts.<sup>267</sup>

The yard stick for a *Clayton* motion is fairness.<sup>268</sup> Applying the statutory criteria, Justice Hornbliss reviewed *Insignares*' character and personal history and found them to be admirable.<sup>269</sup> Then he considered any misconduct by law enforcement before and after conviction.<sup>270</sup> Most notable was the Department of Corrections' failure to abide by the judge's order for the defendant's safety and well-being. He noted:

Inmates have a due process right secured by the Eighth and Fourteenth Amendments that entails reasonable protection from acts of violence and sexual assault perpetrated by fellow inmates. Prison officials have a correlative duty to exercise "reasonable care to prevent prisoners from intentionally harming others or from creating an unreasonable risk of harm."<sup>271</sup>

Balancing the rights of prisoners with the duties of prison officials to oversee their safety, along with the Department of Corrections' refusal to take precautions specifically requested by the court, Justice Hornbliss concluded that *Insignares* was entitled to be kept safe from harm while inside prison walls and that the Department of Corrections had a higher duty because there was a court order requiring additional precautions, which it failed to follow.<sup>272</sup>

Another important criterion considered by the court was the purpose and effect of the sentence. A number of experts appeared

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without a legal remedy, the judge must find a "compelling factor" from among the ten statutory criteria, which address the seriousness of the crime, defendant's background, impact on the community and the justice system, and most notably "the purpose and effect of imposing upon the defendant a sentence authorized for the offense." *Id.*; see also *People v. Clayton*, 342 N.Y.S.2d 106 (N.Y. App. Div. 1973). See generally John F. Wirenius, *A Model of Discretion: New York's "Interests of Justice" Dismissal Statute*, 58 ALB. L. REV. 175 (1994) (discussing New York's unique "dismissal in the interests of justice" application in the overloaded criminal justice system).

266. *Insignares*, 470 N.Y.S.2d at 516.

267. *Id.*

268. See *id.* at 517.

269. *Id.* at 517-18.

270. *Id.* at 518.

271. *Id.* (citation omitted).

272. *Id.*

at the hearing to discuss the impact of prison conditions, including two court-appointed psychiatrists.<sup>273</sup> They testified that Insignares lacked the survival skills required for prison life and that the punishment he had already endured was sufficient deterrence; moreover, continued incarceration would result in mental trauma and the need for psychiatric care.<sup>274</sup> The prosecution experts presented contrary testimony founded mainly on their disbelief that the defendant had been sexually assaulted.<sup>275</sup> Justice Hornblaw found that defendant's experiences in jail were a sufficient deterrent to future criminality, his victimization by other inmates harmed him physically and psychologically, the spotlight shone on his case increased his vulnerability to attack while in Rikers, and that he was no longer mentally able to survive the prison experience.<sup>276</sup> Since the rape occurred while Insignares was a pretrial detainee and thus at a time where he was under the control of the Department of Corrections, it became a crucial sentencing factor.<sup>277</sup> Finally, the court rejected prosecution arguments that the rape never happened.<sup>278</sup>

The conduct of the Department of Corrections and the physical and psychological injuries inflicted on Insignares compelled Justice Hornblaw to dismiss the indictment.<sup>279</sup> The judge was satisfied that the mandatory three years to life in prison was unnecessary in light of the time already served (nine months in Rikers) and defendant's experiences.<sup>280</sup> The court explained its rationale in light of the greater purposes of punishment and its societal benefits: (1) defendant had been sexually attacked in jail awaiting sentence, (2) Insignares, like anyone convicted of a crime, had the right to expect "humane confinement," (3) his treatment in jail went beyond the scope of any lawful penalty, (4) the danger to the defendant would have been preventable if the Department of Corrections had followed the court's order, and (5) Insignares

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273. *Id.* ("Prison administrators, social scientists, and other experts in the field of penology testified to prison conditions generally and how the defendant would fare in the prison environment.").

274. *Id.* at 519.

275. *Id.*

276. *Id.* at 519–20.

277. *Id.* at 519 ("The infliction of punishment, particularly where its severity serves no valid penological purpose, is cruel and inhuman." (quoting *People v. Askew*, 403 N.Y.S.2d 959, 965 (N.Y. Sup. Ct. 1978))).

278. *Id.* at 519–20.

279. *Id.* at 521.

280. *Id.* at 520.

suffered long-term emotional and psychological harm as a result.<sup>281</sup>

This decision was reversed on appeal and remanded for resentencing.<sup>282</sup> The Appellate Division believed that Justice Hornblaw abused his discretion in dismissing the indictment by failing to evaluate the *Clayton* evidence fairly as between the State and the defendant.<sup>283</sup> Their reevaluation of the criteria led to a different result. The appellate court found that crime was more serious and detrimental to the community than the trial court described, and evidence of Insignares' participation in the drug sale was overwhelming.<sup>284</sup> Moreover, the post-conviction misconduct by the Department of Corrections had no bearing on the sentence.<sup>285</sup> This last point was the most important, as the court held that there was no relation to the harm inflicted on Insignares while in custody and his sentence; there was no room for discretion to relieve him of his mandatory punishment.<sup>286</sup> His only remedies were a civil rights action under 42 U.S.C. § 1983 against the Department of Corrections or a request for administrative segregation.<sup>287</sup>

The trial judge in *Insignares* attempted to take into account the infliction of harms caused by jail and prison conditions in order to arrive at an equitable result. Extending the harm of incarceration for Insignares to a minimum of three years, as mandated by state law, seemed counterproductive in view of the defendant's character and suffering. However, on appeal, the War on Drugs took precedence—a war that has played a significant role in prison inflation.<sup>288</sup> The defendant's participation in the selling of cocaine

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281. *Id.*

282. *See* *People v. Insignares*, 491 N.Y.S.2d 166, 175–76 (N.Y. App. Div. 1985).

283. *Id.* at 173.

284. *Id.* at 174.

285. *Id.*

286. *Id.*

287. *Id.* at 175.

288. *See generally* Steven B. Duke, *Mass Imprisonment, Crime Rates, and the Drug War: A Penological and Humanitarian Disgrace*, 9 CONN. PUB. INT. L.J. 17, 17–18 (2010) (footnotes omitted) (“The explosion in our prison population began in 1973, the same year President Nixon declared war on drugs . . . . There is much speculation about the causes of this mass imprisonment mania, but the mechanisms by which mass imprisonment was accomplished are clear. We have continued to arrest people at about the same rate since 1973, but since then we have sentenced those we convict to prison, for much longer terms, with fewer opportunities for parole or early release than in previous years. When we do release someone on parole, we revoke parole and return the parolee to prison more often than we formerly did. That explains how we increased our prison

and the effects his involvement had on society were found to be paramount, and any deviation from the sentencing law was held to be an abuse of discretion. The rape of the defendant by fellow inmates, his nine months spent in jail before trial, and his otherwise steady life were irrelevant.

The *Insignares* case illustrates the change in priorities from rehabilitation and constructive punishments to retribution and punitive isolation without regard to prison conditions. This theme pervades the truth-in-sentencing laws,<sup>289</sup> oppressive prison administration,<sup>290</sup> and nearly automatic parole board denials.<sup>291</sup>

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population eightfold; why we did it is less obvious.”).

289. See WILLIAM J. SABOL ET AL., URBAN INST., THE INFLUENCE OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES’ SENTENCING PRACTICES AND PRISON POPULATIONS (2002), available at [http://www.urban.org/UploadedPDF/410470\\_FINALTISRpt.pdf](http://www.urban.org/UploadedPDF/410470_FINALTISRpt.pdf).

290. See *Enhanced Screening of BOP Correctional Officer Candidates Could Reduce Likelihood of Misconduct*, U.S. DEP’T JUST. (Sept. 2011), <http://www.justice.gov/oig/reports/2011/e1102.pdf> (describing how improvements made in the Bureau of Prisons’ hiring process have reduced the likelihood of officer misconduct and recommending that the Bureau develop a scoring mechanism for assessing the suitability of officer applicants); Tanyika Brime, *We Can Do Better: The State of Custodial Misconduct by Correctional Staff in New York*, 15 CARDOZO J.L. & GEN. 303 (2009) (analyzing a New York custodial sexual misconduct statute and suggesting policy changes to better safeguard inmates); Andrea Jacobs, *Prison Power Corrupts Absolutely: Exploring the Phenomenon of Prison Guard Brutality and the Need to Develop a System of Accountability*, 41 CAL. W. L. REV. 277 (2004) (analyzing the problems inherent in requiring inmates to exhaust their administrative remedies before bringing grievances for inmate abuse to district court). In addition to the inherent systemic problems with administration of prisons, “compassion fatigue” is an inescapable constant. See Andrew Nolen, *Compassion Fatigue and Corrections Officers*, CORRECTIONS.COM (Jan. 3, 2011), <http://www.corrections.com/news/article/27036-compassion-fatigue-and-corrections-officers> (“Compassion fatigue is defined as ‘the formal caregivers [sic] reduced capacity or interest in being empathic or bearing the suffering of clients and is the natural consequent behaviors and emotions resulting from knowing about a traumatizing event experience[d] or suffered by a person’ . . . . It is the ‘reduced capacity or interest in being empathic’ that we can distinctly attribute to Corrections Officers.” (citation omitted)).

291. See, e.g., Joey Hipolito, *In Re Lawrence: Preserving the Possibility of Parole for California Prisoners*, 97 CALIF. L. REV. 1887 (2009) (discussing a California Supreme Court decision that held evidence for denial of parole must be rationally related to the inmate’s “current dangerousness”); John Caher, *Law Requires Board to Assess Rehabilitation in Parole Rulings*, N.Y. L.J. 1 (Sept. 30, 2011), <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202517412972&slreturn=1> (discussing application of a New York law requiring parole boards to establish whether an inmate has been rehabilitated in determining parole decisions). Another factor in the administration of all incarceration policies is “decision fatigue,” or determinations based on non-legal reasoning. See Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT’L ACAD. SCI. 6889 (2011),

Before conviction, defendants might challenge a sentence on Eighth Amendment grounds that it is excessive or disproportionate;<sup>292</sup> and only after conviction can the conditions of confinement be challenged as a “cruel or unusual punishment.” But, as the *Insignares* case and many others illustrate, there should be no dividing line between a sentence of imprisonment and the conditions connected with its service. Sentencing judges can take into consideration the harm that will befall a defendant after incarceration, and some guidelines recognize this reality explicitly in the context of vulnerable defendants. It follows that judges should be able to take Eighth Amendment humane punishment principles into consideration when calculating someone’s sentence.

In *United States v. Corozzo*,<sup>293</sup> the defendant, a sixty-nine-year-old captain in an organized crime family, faced more than thirteen years behind bars. Under the authority of 18 U.S.C. § 3582(d), the United States Attorney requested that the court impose a condition on the defendant’s imprisonment and supervised release that would curtail his ability to communicate with relatives who had criminal records or associate with organized crime members.<sup>294</sup> Judge Weinstein, who presided over the matter, noted that the statute was discretionary and rarely used.<sup>295</sup>

Ultimately, the court agreed with the defense’s rationale that such a condition, without probable cause to believe that the defendant would conduct criminal business from inside, was tantamount to *de facto* solitary confinement.<sup>296</sup> In reaching this conclusion, Judge Weinstein took into account the historical record of institutionalized prison cruelty. Among the examples of

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available at <http://www.pnas.org/content/108/17/6889.full.pdf> (presenting evidence that judicial rulings can be swayed by extraneous factors that should not impact legal decisions); John Tierney, *Do You Suffer from Decision Fatigue?*, N.Y. TIMES (Aug. 21, 2011), <http://www.nytimes.com/2011/08/21/magazine/do-you-suffer-from-decision-fatigue.html?pagewanted=all> (discussing study of parole-granting practices in Israeli prisons that varied according to the time of day).

292. See generally Blake J. Delaney, *A Cruel and Unusual Application of the Proportionality Principle in Eighth Amendment Analysis: Ewing v. California*, 538 U.S. 11 (2003), 56 FLA. L. REV. 459, 460–64 (2003) (discussing the U.S. Supreme Court’s history of proportionality review in light of its decision to uphold a sentence under California’s three strikes law in *Ewing*); Howard J. Alperin, Annotation, *Length of Sentence as Violation of Constitutional Provisions Prohibiting Cruel and Unusual Punishment*, 33 A.L.R.3D 335 (1970).

293. 256 F.R.D. 398 (E.D.N.Y. 2009).

294. *Id.* at 399.

295. *Id.* at 401.

296. *Id.*

“unimaginably cruel conditions” behind bars, the judge took note of the American prisoners packed like sardines in British prison ships during the Revolutionary War and the tens of thousands of Union soldiers confined during the Civil War in Andersonville who died from “disease, exposure and starvation.”<sup>297</sup>

After recounting the horrors of enemy prison camps during the Second World War and the Korean Conflict, Judge Weinstein concluded by observing that when the government seeks to enhance a sentence by aggravating the conditions of confinement, the sentencing judge is duty-bound to take into account the history of treatment behind bars and the mandate of “justice for all.”<sup>298</sup>

The calculus undertaken by Judge Weinstein in *Corozzo* and Judge Hornbliss in *Insignares* demonstrates the value that might spring from including a prison conditions factor in sentencing policies. However, as *Insignares* highlights, there can be conflict between the judge and prison officials. Thus, in the context of a broader sentencing realignment like that proposed above, it would be important to include specific policies that ensure that a judge’s consideration of prison conditions and a judge’s order requiring certain protocol with respect to a defendant would be adhered to by corrections officials so that prison regulations and actions of corrections officials do not trump the intent of the sentencing court or the legislature that drafted the penal statutes.<sup>299</sup>

#### B. *Transparency and Disclosure*

In addition to policies that would effectuate judicial consideration of prison conditions at the sentencing stage, efforts should be made to ensure that other actors in the criminal justice system and members of the public pay more attention to prison conditions. These are especially relevant steps in light of the Court’s decision in *Brown v. Plata*. The case illustrates the difficulty that states are having in improving the conditions of confinement on an *ad hoc* basis, whether due to lack of political will or consensus

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297. *Id.* at 399–400.

298. *Id.* at 400.

299. *See, e.g.,* *Garner v. N.Y. State Dep’t of Corr. Servs.*, 10 N.Y.3d 358, 362 (2008). The sentencing judge failed to advise defendant about the five year post-release supervision (PRS) term and so the Department of Correctional Services (DOCS) imposed it administratively. *Id.* at 360. Challenging a violation of the PRS, the Court of Appeals held that only the sentencing judge had the authority to impose the PRS and the DOCS exceeded its jurisdiction. *Id.* at 362.

on budgetary priorities. In *Plata*, prison population reduction was a powerful and lawful remedy that was resorted to after years of litigation. From a policy perspective, a more useful approach might be for each state to set limits on prison populations.<sup>300</sup> This per-capita cap policy (based on a percentage of the national prison census) is a first step suggested by Professor Lynn Branham in her article discussing a multi-faceted plan for changing the mindset behind current carceral practices.<sup>301</sup> Her next step is to recommend a program for monitoring and publishing information about the conditions of confinement,<sup>302</sup> that is, a move towards transparency.

The “transparency and accountability plan”<sup>303</sup> she envisioned is rooted in the work of the American Bar Association<sup>304</sup> and other organizations.<sup>305</sup> In essence, enabling legislation in each state and the federal government would create an independent monitoring agency to investigate and report on prison conditions.<sup>306</sup> This information would be made available online, and sent to the media

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300. See Lynn S. Branham, “*The Mess We’re in*”: *Five Steps Towards the Transformation of Prison Cultures*, 44 IND. L. REV. 703, 707–13 (2011) (suggesting a fifty percent cap on the states’ per capita rate of imprisonment as a first step in changing society’s approach to corrections administration); cf. Cara Anna & David Udell, Op-Ed., *We Need a National Justice Index*, NAT’L L.J. (Dec. 5, 2011), [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202534218778&We\\_need\\_a\\_national\\_Justice\\_Index&slreturn=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202534218778&We_need_a_national_Justice_Index&slreturn=1) (discussing a proposal for ranking states by surveying and then publishing data on resources for indigent representation in criminal and civil systems, which would be made available to legislators, courts and the media); NAT’L CENTER FOR ACCESS TO JUSTICE, <http://www.ncforaj.org> (last visited Mar. 28, 2012) (discussing the Center’s efforts to make courts “accessible and fair”).

301. Branham, *supra* note 300, at 707–10.

302. *Id.* at 713–18.

303. *Id.* at 714.

304. See AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS 67–70 (3d ed. 2010), available at [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_policy\\_midyear2010\\_102i.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midyear2010_102i.authcheckdam.pdf) (discussing accountability and oversight in Part XI); CRIMINAL JUSTICE SECTION, AM. BAR ASS’N, RESOLUTION 105B REPORT TO THE HOUSE OF DELEGATES (2011), available at [http://www.americanbar.org/content/dam/aba/administrative/criminal\\_justice/2011a\\_resolution\\_105b.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/2011a_resolution_105b.authcheckdam.pdf) (adopting “Key Requirements for the Certification of Correctional Accrediting Entities,” which include transparency and accountability requirements).

305. Branham, *supra* note 300, at 714 n.30; see also Ken Strutin, *Criminal Justice Resources: Prisoners’ Rights and Resources on the Web*, LLRX.COM (Nov. 3, 2006), <http://www.llrx.com/features/prisonersrights.htm> (noting sources of prison standards).

306. Branham, *supra* note 300, at 714.

and to legislators.<sup>307</sup> And in response to these reports, prison administrators would be required to respond with action plans for improvements.<sup>308</sup>

The Court's decision in *Brown v. Plata* highlighted numerous sources that can be mined for information on the conditions of confinement (past and present) as well as standards for bringing them up to constitutional levels. Among the sources that ought to be developed and consulted are: legislative impact statements;<sup>309</sup> sentencing or correction commission reports;<sup>310</sup> judicial monitor reports under the PLRA;<sup>311</sup> Executive Orders;<sup>312</sup> agency and quasi-agency reports;<sup>313</sup> academic<sup>314</sup> and private studies;<sup>315</sup> and surveys of prisoners and other stakeholders.<sup>316</sup> Regardless of the information

307. *Id.* at 717.

308. *Id.* at 718.

309. See *infra* notes 317–20 and accompanying text for discussion of carceral impact statements.

310. See *Brown v. Plata*, 131 S. Ct. 1910, 1924 (2011) (citing California's Corrections Independent Review Panel, appointed by the Governor and composed of correctional consultants and representatives from state agencies, as well as the Little Hoover Commission, a bipartisan and independent state body).

311. See *id.* at 1924–30 (discussing the work of the court appointed Special Master and the California Prison Health Care Receivership Corporation).

312. See *id.* at 1924 (citing Governor Schwarzenegger's emergency proclamation addressing the overcrowding problem).

313. See CAL. DEP'T OF CORR. & REHAB., CORRECTIONS: YEAR AT A GLANCE (2010), available at [http://www.cdcr.ca.gov/News/docs/CDCR\\_Year\\_At\\_A\\_Glance2010.pdf](http://www.cdcr.ca.gov/News/docs/CDCR_Year_At_A_Glance2010.pdf) (providing statistics and trend information about various aspects of California's criminal justice system, including adult offenders, juvenile justice, and recidivism); PAUL GOLASZEWSKI, LEGISLATIVE ANALYST'S OFFICE, A STATUS REPORT: REDUCING PRISON OVERCROWDING IN CALIFORNIA 9 (2011), available at [http://www.lao.ca.gov/reports/2011/crim/overcrowding\\_080511.pdf](http://www.lao.ca.gov/reports/2011/crim/overcrowding_080511.pdf) (expressing concern about the state's ability to meet the court-ordered deadline through realignment and suggesting legislative changes to reach those ends).

314. See Driscoll, *supra* note 162 (discussing a study at Stanford Law School on the implications of California's A.B. 109).

315. See, e.g., *Safe Communities, Fair Sentences*, ACLU, <http://www.aclu.org/safe-communities-fair-sentences-0> (last visited Mar. 28, 2012) (describing one of the ACLU's campaigns); *Our Mission*, CORRECTIONAL ASS'N N.Y., <http://www.correctionalassociation.org/about/mission.htm> (last visited Mar. 28, 2012) ("The Correctional Association of New York is an independent, non-profit organization founded by concerned citizens in 1844 and granted unique authority by the New York State Legislature to inspect prisons and to report its findings and recommendations to the legislature, the public and the press.")

316. See, e.g., Scott D. Camp, *Do Inmate Survey Data Reflect Prison Conditions? Using Surveys to Assess Prison Conditions of Confinement*, 79 PRISON J. 250 (1999), available at [http://www.bop.gov/news/research\\_projects/published\\_reports/cond\\_envir/oreprcamp\\_pj3.pdf](http://www.bop.gov/news/research_projects/published_reports/cond_envir/oreprcamp_pj3.pdf) (examining whether inmate survey data can be used for measures of prison conditions at the group level); Scott D. Camp et al., *Using*

sources, the legislature plays the central role in making the best use of them.

Penal legislation is the result of a process based on supporting memos, committee reports, transcripts of debates, and other sources of support or opposition. The legislative history will usually include some discussion of the effect the laws might have on society, the crime rate, or individual security, but rarely is a description of the impact on prison populations or conditions included.<sup>317</sup> Thus, an effective response to the intolerable situations created in the prison system might be to require all penal legislation to include an impact assessment.<sup>318</sup>

The federal Prison Impact Assessments law, enacted in 1994, provides a model to build on: “Any submission of legislation by the Judicial or Executive branch which could increase or decrease the number of persons incarcerated in Federal penal institutions shall be accompanied by a prison impact statement (as defined in subsection (b)).”<sup>319</sup> Still, critics have pointed out that the law falls short of its potential because its coverage is limited and there are no remedies for not adhering to it.<sup>320</sup>

To present a current accurate picture of the state of prison conditions in federal and state institutions, the assessment should be issued in conjunction with all new penal legislation under review

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*Inmate Survey Data in Assessing Prison Performance: A Case Study Comparing Private and Public Prisons*, 27 CRIM. JUST. REV. 26 (2002), available at [http://www.bop.gov/news/research\\_projects/published\\_reports/pub\\_vs\\_priv/oreprcamp\\_cjr.pdf](http://www.bop.gov/news/research_projects/published_reports/pub_vs_priv/oreprcamp_cjr.pdf) (showing that inmate surveys can be used to obtain information about prisons, such as safety and security, sanitation, and gang activity).

317. See Samuel H. Pillsbury, *Understanding Penal Reform: The Dynamic of Change*, 80 J. CRIM. L. & CRIMINOLOGY 726, 766–68 (1989) (reviewing the major trends in criminal legislative reform movements, the author notes that scarcely any attention was given to the impact of new determinate sentencing laws on prison population growth).

318. See generally Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1101 (2002) (“Under both federal and state law, agencies must file an ‘Environmental Impact Statement’ (EIS) that details the effect of particular development decisions on the environment. Rules could similarly require developers to file a ‘Crime Impact Statement’ (CIS) before constructing a large project.” (footnote omitted)).

319. 18 U.S.C. § 4047(a) (2006); accord MO. REV. STAT. § 217.022(1) (2011) (requiring prison impact statement for “any legislation” affecting the prison or parole population numbers); R.I. GEN. LAWS § 42-56-39 (2011) (requiring explanatory note for legislation affecting corrections budget).

320. See generally Ronald Goldstock et al., *In Our Every Deliberation . . . Time for Federal Crime Policy Impact Statements*, CHAMPION MAG., May 1999, at 18, 20–21 (“We propose that Congress revise 18 U.S.C. § 4047 to make it applicable to all criminal justice policy proposals.”).

and available to participants in the adjudication process. Thus, it could be more than a financial cost-benefits analysis; it would be a way to monitor the conditions of confinement and educate legislators about the effects of new crimes and punishments. Moreover, it could be an effective tool for reviewing existing laws that are largely responsible for over-incarceration. The assessment would serve to help lawmakers and courts adjust prison sentences to reflect societal values, curb the epidemic of mass imprisonment, and humanize sentences by taking into account the conditions of confinement.<sup>321</sup>

California's A.B. 109 is a type of post-assessment legislation, albeit an assessment driven by litigation, drafted after the prison problem reached critical mass. And the participants in the state's criminal justice system are now fully aware of these circumstances. Thus, they will be adjudicating cases in a new framework, localizing punishment, and emphasizing alternatives to incarceration. Indeed, the Supreme Court's decision might create a ripple effect throughout the legislatures<sup>322</sup> and criminal justice systems of every state, compelling legislators, judges, and prosecutors to consider the outcomes of their choices.

For instance, Professor Adam M. Gershowitz has posited that increasing prosecutors' awareness of prison populations, and ergo, conditions, would have an ameliorating impact on charging decisions and would result in the reduction of imprisonment recommendations.<sup>323</sup> He suggests that laws be enacted to require systematic monitoring and disclosure of prison information. "Prosecutors should be informed about the total number of inmates incarcerated, the percentage of prison capacity filled, the

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321. Cf. David A. Rossi, *Jumping the Gun: Iowa's Swift Adoption of Minority Impact Statement Legislation Points to Other Problems Within the State's Criminal Justice System*, 58 DRAKE L. REV. 857 (2010) (examining the purposes and potential problems of Iowa's minority impact statement legislation).

322. The "Model Proportionality in Sentencing Act" described in Schneider, *supra* note 11, at 30, would complement and supplement California's realignment, whose delisting of non-violent, non-serious, non-sex offenders from state prison sentences is practically a legislative proportionately assessment. The point made clear by California's new approach and Schneider's Model Act is that the legislature should provide judges with the tools to address the inevitable disparities in sentencing laws that result in unconstitutional conditions of confinement and other effects detrimental to society's welfare and safety. Otherwise, criminal courts are left to apply their own patchwork proportionate reviews. See *id.* at 33-34.

323. Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 47 (2008).

increase in prison population over the last few years, and whether any prisons in the jurisdiction are under court supervision because of overcrowding or confinement conditions.”<sup>324</sup>

By inculcating this mentality among prosecutors, it would increase awareness of the outcomes of prison sentences. It might even lead to a mandatory review of prison conditions as part of the presentence investigation, perhaps with input from oversight agencies. In fact, informing judges, prosecutors, and defendants of the status of prison life, like a daily stock market report, is in line with corrections departments’ and law enforcements’ current reporting duties that provide data for policymakers and researchers.<sup>325</sup>

In an article by Jeffrey Zahler, he suggests that the jury’s right to exercise its nullification power supports the right to acquit defendants for whom the sentence would be too harsh and excessive, that is, their vulnerability to certain prison conditions.<sup>326</sup> Zahler’s thesis is that the jury nullification option could be exercised on behalf of vulnerable defendants who face prison conditions that would violate the Eighth Amendment.<sup>327</sup> In a sense, the jury, as the “conscience of the community,” becomes a check on the limits of punishment and policy making.<sup>328</sup> In reality, it is not very different from the concept of punitive damages in a civil case.<sup>329</sup> A huge damages award is intended to send a message disapproving of one party’s conduct, just as acquitting a defendant due to the harshness of the sentence might do.<sup>330</sup>

Therefore, the jury acquittal becomes the equivalent of an

324. *Id.* at 50; *see, e.g., 2011 Public Safety Realignment*, CAL. DEP’T CORRECTIONS & REHABILITATION, <http://www.cdcr.ca.gov/realignment/> (last visited Mar. 28, 2012) (providing weekly population figures for prisoners and parolees and an overview of the state’s plan to reduce its number of inmates).

325. *See generally About JRSA*, JUST. RES. & STAT. ASS’N, <http://www.jrsa.org/about/index.html> (last visited Mar. 28, 2012) (“[The JRSA] is a national nonprofit organization of state Statistical Analysis Center (SAC) directors, researchers, and practitioners throughout government, academia, and criminal justice organizations dedicated to policy-orientated research and analysis.”).

326. Jeffrey Zahler, *Allowing Defendants to Present Evidence of Prison Conditions to Convince Juries to Nullify: Can Only the Prosecutor Present “Moral” Evidence?*, 34 N.E. J. ON CRIM. & CIV. CONFINEMENT 485, 516 (2008).

327. *Id.* at 502–09.

328. *Id.* at 516.

329. *See generally* Theodore Eisenberg & Michael Heise, *Judge-Jury Difference in Punitive Damages Awards: Who Listens to the Supreme Court?*, 8 J. EMPIRICAL LEGAL STUD. 325 (2011).

330. *See* Studnicki, *supra* note 220.

Eighth Amendment injunction against harsh sentences for vulnerable people based on prison conditions. The possibility that jury nullifications based on prison conditions might spark legislative or judicial reform suggests an approach from the ground up similar to the model suggested for amending the Federal Sentencing Guidelines.<sup>331</sup> The impetus for reform could be fueled by recognizing that court-applied exceptions to incarcerative sentences and jury acquittals are only substitutes for improving conditions within the penal system. In other words, more exceptions found by judges and a growing number of not-guilty verdicts by jurors would indicate where changes are needed in the criminal justice system.<sup>332</sup> Thus, those who work in the trenches of daily practice might find safety valves to forestall upticks in incarceration well ahead of the next crisis.

## VII. CONCLUSION

Prisons are filled with “representatives of humanity.”<sup>333</sup> The Supreme Court reminded us of this when they decided that the evils resulting from overcrowding were unconstitutional and ought to be remedied by an order to reduce California’s prison population.<sup>334</sup> The majority<sup>335</sup> was so appalled that they took the rare step of including photographs<sup>336</sup> of the horrendous living conditions in two of the prisons and the cage used for detaining prisoners while treating for mental illness. And California has rolled out a virtually new criminal justice system to stem the flow of

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331. See Zahler, *supra* note 326, at 509–10.

332. *Id.* at 514–15.

If evidence of prison conditions is admitted in criminal trials, and the acquittal rate rises dramatically, society will have a much greater incentive to reform the prison system. If prison conditions are so revolting that adequately informed juries are not willing to incarcerate otherwise guilty defendants, the solution should be to fix the problems with prisons. The alternative solution currently used, which is to hide the problems in the hope that juries can be tricked into incarcerating people who they would not choose to condemn if they had more information, is not a solution that any society should be proud of.

*Id.*

333. See Henry, *supra* note 190, at 202 (describing the concept of “equality as dignity”).

334. See *Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011).

335. It is notable that there were no concurring opinions, which indicates solidarity on the reasoning and approach to prisoners’ rights by five of the justices. *Id.* at 1947.

336. *Id.* at app. B & C.

non-violent offenders and technical parole violators into state prison and at the same time raised the cache of alternatives to incarceration. Overall, the Court's decision was a tocsin for every jurisdiction with prison populations at the boiling point.<sup>337</sup>

The exceptions to incarcerative sentences highlight the problems with their overuse. The risk of harm and sexual assault; the deleterious impact on the elderly, infirm, and mentally challenged; and a host of other factors already discussed have justified in individual cases amelioration of the immutable prison option. The catalog of prison-induced harm found in the Supreme Court's decision, the body of penal laws that have been repealed, the sentences vacated,<sup>338</sup> and the prison conditions declared "cruel and unusual"<sup>339</sup> are a testament to the need for reform. Unconstitutional confinement cannot be tolerated or sanitized out of convenience, political/economic necessity, or tradition. Neither the passage of time nor the intensity of public opinion can make a virtue of it.<sup>340</sup> The development of prisons into precincts of abuse is the result of indifference, insensitivity, and collective

337. See, e.g., Kurt Erickson, *Illinois Could Face California-Style Prison Meltdown, Experts Say*, QUAD-CITY TIMES (Aug. 24, 2011, 9:03 PM), [http://qctimes.com/news/local/article\\_c3390cb4-cebe-11e0-b9c3-001cc4c03286.html](http://qctimes.com/news/local/article_c3390cb4-cebe-11e0-b9c3-001cc4c03286.html). In response to Illinois's rising prison population, around 137 percent of capacity, the solution at the forefront is to recalculate the available space.

Instead of using an industry standard based on the number of cells, the state is now measuring capacity based on how many beds can fit in a facility. . . . [Rebekah] Evenson [the attorney involved in the California lawsuit] said recalculating capacity based on bed space is 'very, very irresponsible' because it could lead to numerous problems.

*Id.*

338. See generally Howard J. Alperin, Annotation, *Length of Sentence as Violation of Constitutional Provisions Prohibiting Cruel and Unusual Punishment*, 33 A.L.R.3D 335 § 2[a] (1970).

339. See generally William H. Danne, Jr., Annotation, *Prison Conditions as Amounting to Cruel and Unusual Punishment*, 51 A.L.R.3D 111 § 2[a] (1973).

340. See generally CHRISTOPHER HARTNEY & SUSAN MARCHIONNA, NAT'L COUNCIL ON CRIME & DELINQUENCY, ATTITUDES OF US VOTERS TOWARD NONSERIOUS OFFENDERS AND ALTERNATIVES TO INCARCERATION (2009), available at [http://www.nccd-crc.org/nccd/pubs/2009\\_focus\\_nonserious\\_offenders.pdf](http://www.nccd-crc.org/nccd/pubs/2009_focus_nonserious_offenders.pdf) (discussing the Zogby survey that revealed that most people were in favor of alternatives to incarceration for non-violent, non-serious crime); Douglas A. Berman, "Should Sentences Reflect the Will of the Public?," SENT'G L. & POL'Y BLOG, (Oct. 12, 2011, 11:03 AM), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2011/10/should-sentences-reflect-the-will-of-the-public.html](http://sentencing.typepad.com/sentencing_law_and_policy/2011/10/should-sentences-reflect-the-will-of-the-public.html) ("In his tough questioning of USSC Chair Judge Patti Saris, Rep. Gowdy suggested he would favor having Congress 'codify' the guidelines via statutes (which would, of course, require jury findings of all aggravating factors based on *Apprendi/Blakely*). Rep. Gowdy also noted that some states have jury sentencing.")

forgetting.<sup>341</sup> Indeed, this article is only part of the ongoing dialogue reappraising plea and sentencing practices and modes of punishment that have led society to this point.<sup>342</sup>

The very existence of the prison system desensitizes people to cruelty and promotes indifference to suffering.<sup>343</sup> Furthermore, the practice of incarcerating millions cuts a swath through communities across the nation and through the living fabric of tens of millions of families. Our current system provides a perpetual guarantee that an indelible segment of the populace will be tagged with a chronic social disease caused by debilitating isolation and mistreatment. The time has come for the collective genius behind American justice to abandon this failed approach and invent a new, humane direction for our system of punishment.<sup>344</sup> And that

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341. These three facets of human nature are responsible at once for the survival of cruelty in our lives and institutions, or, as William Blake put it, "Cruelty has a human heart." William Blake, *A Divine Image* in SONGS OF INNOCENCE AND EXPERIENCE (1789), available at <http://www.online-literature.com/blake/songs-of-innocence-and-experie/43/>. See generally PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL (2007); *People 'Still Willing to Torture'*, BBC NEWS (Dec. 19, 2008, 10:41 AM), <http://news.bbc.co.uk/2/hi/health/7791278.stm> (discussing new American experiments validating the Milgram test about the willingness of ordinary people to inflict pain on others due to social pressure); Philip G. Zimbardo, *Stanford Prison Experiment Slide Tour: An End to the Experiment*, STAN. PRISON EXPERIMENT, <http://www.prisonexp.org/psychology/37> (last visited Mar. 28, 2012) (discussing why the experiment was terminated early).

342. See Mary Ellen Mastrorilli, Replacing "Hard Cells" With "Soft Cells": A Hard Sell for Criminal Justice Policy Makers (unpublished manuscript), available at <http://ssrn.com/abstract=1881084>; Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1 (2011). See generally AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS (3d ed., 2010), available at [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_policy\\_midyear2010\\_102i.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midyear2010_102i.authcheckdam.pdf) (advising the legal profession and judiciary on correctional practices).

343. See John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293, 329 (1980) ("Those guilty of serious crimes merit the wrath of our society. But almost no one deserves the hell holes that we call jails and prisons. There is almost no case I would not defend if that meant keeping a human being, as condemnable as he or she may be, from suffering the total, brutal inhumanity of our jails and prisons."); David Brooks, *Let's All Feel Superior*, N.Y. TIMES (Nov. 14, 2011), <http://www.nytimes.com/2011/11/15/opinion/brooks-lets-all-feel-superior.html> ("Some people simply can't process the horror in front of them. Some people suffer from what the psychologists call Normalcy Bias. When they find themselves in some unsettling circumstance, they shut down and pretend everything is normal.")

344. See, e.g., Nicola Abé, *Doing Time on Norway's Island Prison*, SPIEGEL ONLINE INTERNATIONAL (Feb. 11, 2011), <http://www.spiegel.de/international/zeitgeist/0,1518,744851,00.html> (describing a Norwegian prison that "emphasizes self-

realignment begins with full disclosure about and full consideration of the present conditions of confinement and their consequences.

It is the unconstitutionality of prison conditions, made evident by Eighth Amendment claims, which compels new policies seeking sentence reductions and alternatives to incarceration. Without a policy making the conditions of confinement transparent, constitutional justice will be observed only in the breach.<sup>345</sup> Once lawmakers, adjudicators, and advocates are made aware of the conditions of confinement and their effects, the trip hammer of carceral punishment might not fall as swiftly.<sup>346</sup>

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control instead of the strictly regulated regimens common in most prisons”); William Lee Adams, *Norway Builds the World’s Most Humane Prison*, TIME (May 10, 2010), <http://www.time.com/time/magazine/article/0,9171,1986002,00.html> (“In the Norwegian prison system, there’s a focus on human rights and respect,” says Are Hoidal, the prison’s governor. “We don’t see any of this as unusual.”); Jim Lewis, *Behind Bars . . . Sort of*, N.Y. TIMES (June 10, 2009), <http://www.nytimes.com/2009/06/14/magazine/14prisons-t.html?pagewanted=2&sq=Behind%20Bars%20.%20.%20.%20Sort%20of&st=cse&scp=1> (describing the Leoben facility in Austria as an example of progressive prison design that does not “punish people with architecture”).

345. Future generations will continue to follow this practice because confinement is a boundless solution that can be utilized by any society indifferent to the results or the rights of those who must endure them. Kwame Anthony Appiah, *What Will Future Generations Condemn Us For?*, WASH. POST (Sept. 26, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/24/AR2010092404113.html> (“[T]he full extent of the punishment prisoners face isn’t detailed in any judge’s sentence. More than 100,000 inmates suffer sexual abuse, including rape, each year; some contract HIV as a result. Our country holds at least 25,000 prisoners in isolation in so-called supermax facilities, under conditions that many psychologists say amount to torture.”); *Timeline: Prisons in England*, BBC NEWS (Apr. 7, 2006, 7:28 PM), [http://news.bbc.co.uk/2/hi/uk\\_news/4887704.stm](http://news.bbc.co.uk/2/hi/uk_news/4887704.stm) (providing an eight century review of prison life and policies illustrating that punishments set precedents that are often repeated).

346. See generally M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach*, 9 AM. L. & ECON. REV. 1 (2007) (studying the effects of security classifications on federal prisoners showing that those subjected to severe conditions were more likely to commit new crimes than those who served their time in minimal level facilities).