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## Does Prison Reform Bring Sentencing Reform? The Congress, the Courts, and the Structural Injunction

Brian K. Landsberg\*

*The structural suit is one in which a judge, confronting a state bureaucracy over values of constitutional dimension, undertakes to restructure the organization to eliminate a threat to those values posed by the present institutional arrangements.<sup>1</sup>*

*The structural injunction recognizes the bureaucratic nature of the modern state.<sup>2</sup>*

*A classic metaphor for a polycentric problem is a spider web, in which the tension of the various strands is determined by the relationship among all the parts of the web, so that if one pulls on a single strand, the tension of the entire web is redistributed in a new and complex pattern.<sup>3</sup>*

This is a symposium on sentencing reform, but I was asked to write about prison reform litigation. These seem like two independent areas of reform. Still, one could argue that the two are inextricably intertwined, since prisons flow from sentences of confinement and those sentences rely on the availability of a place of confinement. So that is a connection that this Article explores. It is a connection that Congress addressed in the Prison Litigation Reform Act of 1995 (PLRA) which, perhaps unwittingly, validated the structural injunctions in cases attacking conditions of confinement as unconstitutional. And it is a connection that lies not far beneath the surface of the California prison reform case, *Brown v. Plata*.<sup>4</sup> Both the statute and the decision in *Plata* are more than what appears on the surface.<sup>5</sup>

Prisoners in California's state prison system brought suit to attack the grossly inadequate mental and physical medical care provided to them during their confinement.<sup>6</sup> The suits did not attack California's draconian sentencing laws; it

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1. Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979) [hereinafter *The Forms of Justice*].

2. OWEN M. FISS & DOUG RENDLEMAN, *INJUNCTIONS* 528 (2d ed. 1984).

3. William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 645 (1982), quoted in *Plata v. Schwarzenegger*, No. C01-1351TEH, 2005 WL 2932253, at \*25 (N.D. Cal. Oct. 3, 2005) (on file with the *McGeorge Law Review*).

4. *Brown v. Plata*, 131 S. Ct. 1910 (2011).

5. See 18 U.S.C. § 3626 (1997); *Plata*, 131 S. Ct. at 1910.

6. *Plata*, 131 S.Ct. at 1922 (2011).

is doubtful that a constitutional attack on those laws would have succeeded.<sup>7</sup> The PLRA sought to impose strict limits on remedies in cases like *Brown v. Plata* attacking prison conditions.<sup>8</sup> However, despite these limitations, the Court in *Brown v. Plata* issued an order requiring the reduction of the prison population in California.<sup>9</sup> Some may regard the result as a form of sentencing reform.<sup>10</sup> This result flows from the convergence of a structural injunction, a resistant state government, and the constraints on federal court power: the Court could not effectively order the construction of new prisons to remedy the overcrowding that was arguably at the root of the unconstitutional medical conditions.

For this symposium on sentencing reform, this article uses the recent Supreme Court decision in *Brown v. Plata*<sup>11</sup> as a platform to consider the relationship between traditional structural injunctions, Congressional legislation, and prison sentences. In adopting the PLRA, Congress reacted to a perceived excess of structural injunctions flowing from findings that conditions of confinement in prisons violated constitutional norms.<sup>12</sup> The PLRA creates procedural and substantive requirements for entry of a “prisoner release order,” but it largely replicates the law of structural injunctions and, contrary to the dissents in *Plata*,<sup>13</sup> places toothless limits on relief. The order under appeal in *Plata* seems to fall within the PLRA’s definition of a prisoner release order, and the Court held that it complied with the PLRA.<sup>14</sup> Experience under *Plata* suggests that the prison cases are at best a crude and indirect method of sentencing reform.<sup>15</sup> Sentencing reform should be based on careful legislative review of sentencing laws, rather than on the need to provide a constitutional minimum of medical and mental health care. Yet the judicial findings in the California cases may lead to demand for sentencing reform,<sup>16</sup> and the relief in those cases may lead to changes in the length of time prisoners serve and may lead to their

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7. Even in the area of the death penalty, the Supreme Court has only found certain instances of the death penalty unconstitutional under the cruel and unusual punishment clause of the Constitution, based on disproportionality of the punishment. *E.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 815 (1988) (holding the death penalty cruel and unusual as applied to a fifteen year old); *Enmund v. Florida*, 458 U.S. 782, 787 (1982) (holding the death penalty cruel and unusual as applied to someone satisfying the mens rea for robbery, but not murder).

8. 18 U.S.C. § 3626 (1997).

9. *Plata*, 131 S. Ct. at 1946.

10. Michael Vitiello, *Alternatives to Incarceration: Why is California Lagging Behind?*, 28 GA. ST. U. L. REV. 1275, 1294–98 (2012).

11. 131 S. Ct. at 1910. The Supreme Court opinion reviews an order in two consolidated lower court cases, *Coleman v. Brown* and *Plata v. Brown*. This article refers to both cases as *Plata*.

12. Alicia Bower, Comment, *Unconstitutionally Crowded: Brown v. Plata and How the Supreme Court Pushed Back to Keep Prison Reform Litigation Alive*, 45 LOY. L. A. L. REV. 555, 565 (2012).

13. *Plata*, 131 S. Ct. at 1950–68 (Scalia, J. and Alito dissenting).

14. *Id.* at 1937.

15. See Steven Nauman, Note, *Brown v. Plata: Renewing the Call to End Mandatory Minimum Sentencing*, 65 FLA. L. REV. 855, 880 (2013).

16. See *id.* at 879.

diversion to jails rather than prisons—arguably a sort of sentencing reform. Thus, while no court in a case challenging prison conditions has ordered the state to “reform your sentencing laws or policies,” it may be worthwhile to examine the relationship between prison reform and sentencing reform.

## I. THE STATEWIDE STRUCTURAL INJUNCTION

The prison cases, much like the school desegregation cases that blazed a trail for structural injunctions, have their genesis in the creation of a legal duty.<sup>17</sup> For example, the Supreme Court agreed in 1976 that prisoners had a right to adequate health care,<sup>18</sup> a ruling that undergirds the lower court findings of violations in the *Plata* cases.<sup>19</sup> Conditions of confinement in prisons in Alabama, Texas, and Arkansas gave rise to the early structural injunctions against prison systems.<sup>20</sup> In Arkansas, the initial decrees were simple prohibitions on continuation of unconstitutional practices, such as whipping prisoners, and imposing other corporal punishment of prisoners without adequate safeguards.<sup>21</sup> After five years of litigation, the federal district court in Arkansas, faced with truly horrific conditions, looked to the Due Process and Cruel and Unusual Punishment Clauses of the Fourteenth and Eighth Amendments to find a right to minimally adequate conditions of confinement.<sup>22</sup> At that point, the court eschewed looking at each separate condition individually and adopted a totality of the circumstances test.<sup>23</sup> Nor did they examine separately each prisoner’s situation.<sup>24</sup> The test can be criticized as murky. The totality of circumstances test, applied to the prison population as a whole, had a profound impact on the remedy.<sup>25</sup>

Remedy tended to follow a familiar trajectory. Remedy flows from violation. “As with any equity case, the nature of the violation determines the scope of the remedy.”<sup>26</sup> The Court has never said that a structural violation could go without remedy, although in one notable case its finding that there was no structural violation seemed to flow from its conclusion that the courts were not competent

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17. See Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 558–59 (2006).

18. *Estate v. Gamble*, 429 U.S. 97 (1976).

19. See *Parsons v. Ryan*, 754 F.3d 657, 677 (9th Cir. 2014).

20. Schlanger, *supra* note 17, at 569–70 n.71.

21. *Talley v. Stephens*, 247 F.Supp. 683, 689 (E.D. Ark. 1965).

22. *Holt v. Sarver*, 309 F. Supp. 362, 364 (E.D. Ark. 1970) (*Holt II*). See also, *Jackson v. Bishop*, 268 F. Supp. 804, 816 (E.D. Ark. 1967); *Jackson v. Bishop*, 404 F.2d 571, 580–81 (8th Cir. 1968); *Courtney v. Bishop*, 409 F.2d 1185, 1186 (8th Cir. 1969); and *Holt v. Sarver*, 300 F. Supp. 825, 826 (E.D. Ark. 1969) (*Holt I*) for cases in Arkansas in the intervening years.

23. *Holt II*, 309 F.Supp. at 373.

24. *Id.*

25. See *id.* at 383–84.

26. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

to impose a structural remedy.<sup>27</sup> In the typical prison conditions case, once it found a violation of the Constitution, the court would enter a prohibitory injunction to stop cruel and unusual punishment or a mandatory injunction to fix the conditions of confinement so they would no longer be unconstitutional.<sup>28</sup> These injunctions would fail, for a couple of reasons. First, they were directed at large bureaucratic organizations with diffusion of responsibility.<sup>29</sup> Second, the bureaucrats relied on the legislature for their funding, and the legislature placed prison funding low on their priority list.<sup>30</sup> To make matters more difficult, the prison officials also had to contend with their employees, the correctional officers, whose actions contributed in a big way to the unconstitutional conditions. In some cases a court may be tempted to engage in *in terrorem* tactics to encourage compliance—threaten to release prisoners, take over the prison system, or impose taxes.<sup>31</sup> These tactics have not proven successful.<sup>32</sup> More successful are orders to keep records relating to conditions and to file periodic reports to the court.<sup>33</sup>

Once the prohibitory injunction fails to bring about reform, the court recognizes that the problem is systemic and that the defendants not only need more specific direction but there is a need to restructure the institution.<sup>34</sup> At this point, the court may well turn to a special master to evaluate reports to the court, investigate conditions, evaluate plans which the defendants may propose, and develop a court plan if the defendant's plans prove inadequate.<sup>35</sup> If these methods do not work, the court may appoint a receiver to take control of the prison

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27. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 7, 41 (1973).

28. Some courts were more aggressive, such as Judge Justice in the Texas case, *Ruiz v. Estelle*, 503 F. Supp. 1265, 1391 (S.D. Tex. 1980).

29. *See, e.g., id.* at 1274 (concerning the practices of the Texas Department of Corrections, a state agency “responsible for the confinement and management of adult convicted prisoners of the State of Texas”).

30. *See, e.g., id.* at 1290 (finding that the Texas legislature apportioned funding for prison staffing at a level significantly below the national average, resulting in a high ratio of prisoners to prison staff).

31. *See e.g.* cases cited *supra* note 22 and accompanying text. *See also* *Holt v. Sarver*, 442 F.2d 304, 306 (8th Cir. 1971); *Holt v. Hutto*, 363 F. Supp. 194, 217 (E.D. Ark. 1973) (*Holt III*); *Finney v. Ark. Bd. of Corr.*, 505 F.2d 194, 207 (8th Cir. 1974); *Finney v. Hutto*, 410 F. Supp. 251, 254 (E.D. Ark. 1976); *Finney v. Hutto*, 548 F.2d 740, 742 (8th Cir. 1977); *Hutto v. Finney*, 437 U.S. 678, 697 (1978); *Finney v. Mabry*, 534 F. Supp. 1026, 1045 (E.D. Ark. 1982); *Finney v. Mabry*, 546 F. Supp. 628, 637 (E.D. Ark. 1982).

32. *See* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 311 (2d Ed. 2008) (concluding that court decrees mandating specific prison policies are not effective because they are likely to be opposed by prison staff).

33. *See* M. HARRIS AND D. SPILLER, *AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS: A CASE STUDY OF HOLT V. SARVER*, NAT'L INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE 12–13 (1976) (courts, like the one in *Holt*, that include the defendant in the process of formulating remedies tend to produce solutions that are “considered correctionally sound and desirable”).

34. *See id.* at 13 (describing how the court in *Hamilton v. Schiro* appointed experts to evaluate “corrections, medicine, architecture, and recreation” after the defendant failed to produce an adequate remedy).

35. *Id.*

system.<sup>36</sup> What order to enter, and when to enter it, was a matter committed to the court's discretion, at least until passage of the PLRA. The California cases generally followed the pattern of the cases that preceded them.<sup>37</sup>

Typically, the plaintiffs in structural injunction suits are represented by organizations with a mission.<sup>38</sup> The model is provided by the NAACP Legal Defense Fund (LDF), a pioneer organization that successfully pursued the goal of overturning school segregation laws and then requiring that the systemic discrimination in dual school systems be eradicated, "root and branch."<sup>39</sup> In California, the litigation for prison reform is led by the Prison Law Office, whose stated objective is a narrow one: "Our assistance is generally limited to cases regarding conditions of confinement."<sup>40</sup> While one might expect the Prison Law Office to embrace sentencing reform, the sentencing system is not its primary target. Instead, it is concerned with what happens to prisoners while they are serving their sentences.<sup>41</sup>

Michael Vitiello's paper describes *Plata* following a path similar to that taken in structural reform cases, as described in the two seminal writings about structural injunctions by Owen Fiss and Abram Chayes.<sup>42</sup> Fiss and Chayes became the inspiration for further development by many scholars, most notably Paul Gewirtz and William A. Fletcher.<sup>43</sup> Among the critics, the most influential has been Gerald Rosenberg.<sup>44</sup> Rosenberg's description of the "constrained" court takes note of the difficulties courts have in imposing politically unpopular remedies, especially when enforcement requires cooperation of reluctant bureaucracies.<sup>45</sup> And experience demonstrates that the difficulties are multiplied

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36. See *id.* at 18 (describing how the mere suggestion of extreme measures such as federal receivership can improve state compliance with federal court directives).

37. See, e.g., *Coleman v. Brown*, 922 F.Supp.2d 1004, 1014 (E.D. Cal. 2013) (imposing specific requirements for prison population reduction).

38. See Stephen L. Wasby, *Race Relations Litigation in an Age of Complexity* 2 (1995) (describing how civil rights organizations often act as a conduit for public opinion).

39. *Id.* at 9; *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430 (1968).

40. Prison Law Office, *About Us*, PRISONLAW.COM, <http://www.prisonlaw.com/about.html> (last visited Feb. 21, 2015) (on file with the *McGeorge Law Review*).

41. *Id.*

42. See generally Fiss, *supra* note 1, at 1; Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV.L. REV. 4 (1982) [hereinafter Chayes, *The Burger Court*].

43. See generally Paul Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROBS. 46 (1976); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982).

44. See David Schultz & Stephen E. Gottlieb, *Legal Functionalism and Social Change: A Reassessment of Rosenberg's The Hollow Hope: Can Courts Bring About Social Change?*, 12 J.L. & POL. 63, 65 (1996) (detailing the importance of Rosenberg's work to political scientists).

45. ROSENBERG, *supra* note 32, at 313.

when the court must rely on the political branches for implementation of their decree.<sup>46</sup>

Another notable aspect of the structural injunction is that it may require state officials to act contrary to state law, even though the state law, standing alone, is constitutional.<sup>47</sup> Thus, prisoners sentenced according to state law may see their sentences reduced even though the sentences were constitutionally valid when imposed.<sup>48</sup> In the course of disapproving a district court order imposing increased property taxes to help finance a school desegregation decree, the Supreme Court relied on the existence of a less intrusive alternative: an order to “levy property taxes at a rate adequate to fund the desegregation remedy.”<sup>49</sup> The clear implication is that, where necessary, the court may order the defendant to levy taxes beyond those authorized by state law. Such an order would either require the legislature to adopt a new tax law or require the executive to levy a tax.

The Court in a prison conditions case typically avoids rewriting sentencing rules and leaves it up to the state officials to determine how best to reduce prison population.<sup>50</sup> While sentencing is individuated, reduction programs may be wholesale in nature, with the details of reduction relegated to bureaucrats.<sup>51</sup> In California, the court orders led in 2009 to adoption of SB 18,<sup>52</sup> expanding good time credits, and changing the parole system in order to reduce prison population, in response to the court’s orders.<sup>53</sup>

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46. Few, if any, courts willingly cite a governor or legislature for contempt when they refuse to implement a decree. This has been the case in *Brown v. Plata*. For example, after remand, when the state persisted in its resistance to prison population reduction, the court observed: “Because of the State’s resistance to complying with that decision, and in order to avoid the necessity of contempt proceedings against the Governor and other state officials, this Three-Judge Court has repeatedly declined to initiate such proceedings and has even *sua sponte* extended the time for defendants to comply with the Population Reduction Order issued in conformity with *Brown v. Plata*.” *Brown v. Plata*, Order Denying Defendant’s Motion to Stay June 20, 2013, No. C01–1351 THE (E.D. Cal. & N.D. Cal. Three-Judge Court, July 3, 2013). The court acknowledged that it could legitimately hold the state in contempt, but instead it would order further steps, and “[f]ailure to take such steps or to report on such steps every two weeks shall constitute an act of contempt.” *Brown v. Plata*, Opinion and Order Requiring Defendants to Implement Amended Plan, No. C01–1351 THE (E.D. Cal. & N.D. Cal. Three-Judge Court, June 20, 2013). Nonetheless, the court’s orders have profoundly changed prison conditions as well as leading to legislative changes described below..

47. See, e.g., *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 974–87 (E.D. Cal. 2009) (proposing various changes to California’s criminal justice system, not because they would cure specific unconstitutional practices, but because they could alleviate an unconstitutional, systemic level of prison overcrowding).

48. See *id.* at 982 (discussing a diversion program whereby “low-risk offenders” would be released from state prisons to participate in “community correctional programs”).

49. *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990).

50. See, e.g., *Coleman v. Brown*, 922 F. Supp. 2d 1004, 1011 (E.D. Cal. 2013) (leaving it up to the defendant how to comply with the prison reduction order).

51. See *Schwarzenegger*, 922 F. Supp. 2d at 974–87 (discussing system-wide reform measures that California officials could implement to achieve lower prison populations).

52. 2009 Cal. Stat. ch. 28, § 36, at 29–30 (enacting CAL. PENAL CODE §§ 1228–1230); § 38, at pp. 39–40 (amending CAL. PENAL CODE § 2933).

53. SB 18 is described in Amanda Lopez, *Coleman/Plata: Highlighting the Need to Establish an Independent Corrections Commission in California*, 15 BERKELEY J. OF CRIM. LAW 96, 107–108 (2010).

Two years later the legislature adopted AB 109, which brought about so-called realignment by shifting some prisoners to county jails.<sup>54</sup> It did not do so by directly transferring prisoners from prisons to jails, but instead diverted incoming prisoners who would normally be sent to prisons to county jails.<sup>55</sup> Realignment does not directly change the length of sentences, only where such sentences are to be served.<sup>56</sup> According to the California Department of Corrections, no prisoners have been freed from prison as a result of realignment.<sup>57</sup> The court also ordered some expansion of good-time credits and new parole processes for elderly persons who have served at least 25 years and for non-violent second offenders.<sup>58</sup> These measures could result in earlier release of some prisoners. The state will only need to consider direct prisoner releases as a population reduction method if it fails to produce a sufficient prison population production with realignment.<sup>59</sup>

The reduction order may hang as a sword of Damocles above the heads of the governor and legislature; however, rather than hanging by a horsehair it is supported by a rope. In an early prison case, a federal district court judge ordered the prison officials to use good time credits, parole, and furlough programs to relieve overcrowding.<sup>60</sup> The Fifth Circuit reversed because the order “unnecessarily invade[d] the management responsibility of state officials.”<sup>61</sup> It later clarified that such a specific order might be justified if inmate population increased “beyond the number authorized by the space requirements of the decree.”<sup>62</sup>

The typical structural injunction, unlike ordinary bipolar litigation, directly affects non-parties.<sup>63</sup> In the school desegregation cases, the structural injunctions

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54. 2011 Cal. Stat. ch. 15, § 1, at 7 (defining the act as the 2011 Realignment Legislation).

55. See 2011 Cal. Stat. ch. 15, §§ 3–633 (redefining sentences for hundreds of crimes by changing the location of imprisonment from state prisons to county jails).

56. See 2011 Cal. Stat. ch. 15, §§ 3–633 (changing the location of where terms of imprisonment are to be served).

57. 2011 *Public Safety Realignment Fact Sheet*, 3, CAL. DEP’T OF CORR. AND REHAB (Dec. 19, 2013), <http://www.cdcr.ca.gov/realignment/docs/realignment-fact-sheet.pdf> (on file with the *McGeorge Law Review*).

58. *Brown v. Plata*, Opinion Re: Granting in Part and Denying in Part Defendants’ Request for Extension of December 31, 2013, Deadline, No. C01–1351 THE (E.D. Cal. & N.D. Cal. Three-Judge Court, Feb. 10, 2014, at 3).

59. *Id.*

60. See *Ruiz v. Estelle*, 503 F.Supp. 1265, 1283–85 (S.D. Tex. 1980) (finding that good time credits, parole reform, and work release were methods by which overcrowding in Texas prison could be reduced and that, by failing to take these measures, state authorities had failed to take adequate measures to address the problem of overcrowding).

61. *Ruiz v. Estelle*, 679 F.2d 1115, 1148 (5th Cir. 1982).

62. *Ruiz v. Estelle*, 688 F.2d 266, 268 (5th Cir. 1982).

63. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–84 (1976) (noting that traditional litigation was “bipolar,” “retrospective,” “self-contained,” “party-initiated[,] and party-controlled,” with a direct relationship between “right and remedy”). By contrast, he said, public law litigation was characterized by “sprawling and amorphous” party structure that is subject to change over the course of the litigation; negotiating/mediating processes; “judge [as] the dominant figure in organizing and



issued by the Court affected white students, teachers of every race, bus drivers, and even whole communities whose schools may be closed or enlarged by the decree;<sup>64</sup> none of these groups are a party to the typical school desegregation case. So it is not surprising that the remedies for widespread denial of adequate medical care, including mental health care, might affect non-parties. The cap on prison population affects prisoners who are not members of the plaintiff class. The effect on members of the plaintiff class is not to transfer them or release them, but to create conditions within the prisons that meet constitutional standards.<sup>65</sup> The relief also affects inmates in county jails, because the state relies on realignment to effect reduction in prison population. An influx of persons sentenced to more than a year's imprisonment not only may lead to overcrowding in jails, but could expose pre-trial detainees and individuals convicted of minor misdemeanors to a tougher bunch of cellmates, depending on how realignment is carried out.

It is reported that over a thousand prisoners in county jails—traditionally reserved for those sentenced to less than a year—are serving terms of five to ten years and that violence in jails has increased since realignment.<sup>66</sup> The same article quotes the Monterey County Sheriff, who described realignment as “a masterful stroke by Governor Brown to shift all the state’s prison problems to county jails.”<sup>67</sup> It seems clear that realignment results in release of some persons who would otherwise spend more time in jail.<sup>68</sup> Realignment was one reason the voters were urged to adopt Proposition 30 in 2012.<sup>69</sup> Proposition 30, which did

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guiding the case;” judge drawing on outsiders: “masters, experts, and oversight personnel;” judge as “creator and manager of complex forms of ongoing relief that have widespread effects on persons not before the court and require the judge’s continuing involvement in administration and implementation.” *Id.* at 1984.

64. See Chayes, *The Burger Court*, *supra* note 42, at 5–6 (finding that by opening the door to “public law litigation,” the Court in *Brown* “committed the federal courts to an enterprise of profound social reconstruction.”).

65. A recent text-book asks whether a judgment that results in releasing many non-class members [implicitly leaving most class members in prison] presents an Article III problem. The authors ask whether the class members face an injury in fact that is fairly traceable to a particular defendant. WILLIAM N. ESKRIDGE JR., ABBE R. GLUCK & VICTORIA F. NOURSE, *STATUTES REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES*, 249, 241 (2014). Neither the Court’s opinion nor the dissent discuss this issue.

66. Christopher Petrella & Alex Friedmann, *Consequences of California’s Realignment Initiative*, PRISONLEGALNEWS.ORG (June 2014), <https://www.prisonlegalnews.org/news/2014/jun/12/consequences-californias-realignment-initiative/> (on file with the *McGeorge Law Review*).

67. *Id.*

68. A highly publicized example is former California Senator Rod Wright, who was sentenced to 90 days in jail but served no time because the jails in Los Angeles are overcrowded. The sheriff’s office insisted that Wright was being treated the same as any other convict. In effect, the judicial sentence is subject to downward revision by the sheriff. Laurel Rosenhall, *Rod Wright’s Jail Time Goes from Ninety Days to Less Than Ninety Minutes*, SACRAMENTO BEE (last updated Nov. 2, 2014), <http://www.sacbee.com/news/politics-government/capitol-alert/article3509632.html> (on file with the *McGeorge Law Review*).

69. CAL. BUDGET PROJECT, *WHAT WOULD PROPOSITION 30 MEAN FOR CALIFORNIA?* 1 (Sep. 2012), available at [http://calbudgetcenter.org/wp-content/uploads/120911\\_Proposition\\_30\\_BB.pdf](http://calbudgetcenter.org/wp-content/uploads/120911_Proposition_30_BB.pdf) (on file with the *McGeorge Law Review*).

pass, reads: “This measure gives constitutional protection to the shift of local public safety programs from state to local control and the shift of state revenues to local government to pay for those programs.”<sup>70</sup> It is financed by a four-year tax increase on the wealthy.<sup>71</sup> The decree potentially affects society at large, as the state addresses the population problem by either spending the taxpayers’ money on building new prisons or granting early release to some prisoners.<sup>72</sup> Its effects on local governments prompted an organization representing them to file a brief supporting the state’s appeal.<sup>73</sup> The law also affects prison guards, who will benefit if population reduction leads to more manageable prisons, but will be adversely affected if the lower population leads to lower demand for their services.<sup>74</sup> “CCPOA’s members cannot adequately perform these duties given the current state of overcrowding. Based on its members’ experience with the day-to-day realities of overcrowding and the resulting medical deficiencies in California’s prisons, CCPOA took the extraordinary step of intervening in the three-judge court remedial proceedings on the same side as the plaintiffs.”<sup>75</sup>

At the same time, both separation of powers and notions of federalism have influenced the development of the structural injunction. Judges strain to avoid administering schools or prisons or institutions for the disabled, because those duties lie beyond their competency, because they are traditionally left to the executive branch, and because the power to regulate schools and state confinement institutions belongs to the states.<sup>76</sup> To the extent that a case might

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70. DEBRA BOWEN, CAL. SECRETARY OF STATE, OFFICIAL VOTER INFORMATION GUIDE, CAL. GENERAL ELECTION, TUESDAY NOV. 6, 2012, 80 (2012), available at <http://vig.cdn.sos.ca.gov/2012/general/pdf/complete-vig-v2.pdf> (on file with the *McGeorge Law Review*).

71. See *id.* at 83 (establishing new income tax rates for individuals earning more than \$250,000).

72. Under realignment, parolees who violate the terms of their parole are to be sent to jail rather than prison, even if they have serious criminal backgrounds. Heather Tirado Gilligan, *Prison Reform’s Unintended Consequences*, CAL. HEALTH REPORT (Jan. 25, 2013), <http://www.healthycal.org/prison-reform’s-unintended-consequences/> (on file with the *McGeorge Law Review*). It has been alleged that jail overcrowding leads to early release or even failure to incarcerate parole violators. *Id.* The Sacramento Bee reported that realignment had “disappointed advocates who had lofty hopes that counties would reduce California’s notoriously high rate of inmates who commit new crimes soon after hitting the streets.” Brad Branan, *The Public Eye: Rearrest Rate Unchanged Under California Prison Realignment*, SACRAMENTO BEE (last updated Oct. 7, 2014, 1:57 PM), <http://www.sacbee.com/news/investigations/the-public-eye/article2588490.html> (on file with the *McGeorge Law Review*). The story suggests that realignment was not accompanied by needed parole supervision or drug rehabilitation. *Id.*

73. Brief for the Cal. Ass’n. of Cnty., et al., as Amici Curiae Supporting Appellants, *Brown v. Plata*, 131 S.Ct. 1910 (2011) (No. 13–198). The brief argued that public safety realignment created a “profound shift in prisoner management in California, which should be carefully considered before requiring additional prisoner releases,” and that “release of higher risk offenders jeopardizes public safety and burdens county resources dedicated to successfully implementing realignment.” *Id.*

74. See Brief for Appellee Intervenor California Correctional Peace Officers’ Association at 3, *Schwarzenegger v. Coleman*, 131 S.Ct. 1910 (2011) No. 09–1233 (arguing that prison guards are “front line” officials administering services in California prison and suffering the impact of prison overcrowding).

75. *Id.* at 2.

76. See ROSENBERG, *supra* note 32, at 308–10 (finding that judicial power to reform state institutions is limited by the power of state authorities).

implicate policy questions such as increased taxes, the purposes of confinement, construction of new facilities, assignment of personnel, and the like, courts have shown great reluctance to displace the state or local policy making apparatus.<sup>77</sup> They do so only as a last resort, when the defendants effectively punt to the court and abdicate their responsibility to carry out the court's orders.<sup>78</sup>

The law treats challenges to the validity of sentences and conditions of confinement separately—except, of course, that the state may not deliberately sentence an individual to cruel and unusual punishment or other unconstitutional treatment.<sup>79</sup> State court judges, when they send convicted defendants to prisons, do not deliberately sentence them to cruel and unusual punishment or to deprivation of life or liberty without due process of law. As Herbert Wechsler and Jerome Michael wrote many years ago, “the criminal law . . . should serve the end of promoting the common good; and . . . its specific capacity for serving this end inheres in its power to prevent or control socially undesirable behavior.”<sup>80</sup> Most of criminal law is committed to the state government, and the policy of how best to promote the common good is normally committed to the legislative and executive branches of government. The federal courts become involved when the state oversteps constitutional limits, but in remedying those cases they must take into account the proper role of the states and the other branches. State sentencing policy is not, without more, a proper matter for the federal courts.<sup>81</sup> If the prisons were not overcrowded, the state would still be concerned with reaching the optimal balance in sentencing policy. If sentencing policies were perfect, there might still be overcrowded prisons, with attendant unconstitutional denial of minimally acceptable medical care and mental health care.

Even if the prison conditions case does not lead to an order to release prisoners, one should not discount the impact of the court's findings on public opinion and on public officials. Thus, a study of the Arkansas prison conditions litigation found: “Viewed from a broad perspective, the litigation touched several

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77. See HARRIS & SPILLER, JR., *supra* note 33, at 12 (finding that courts yield to state authorities on matters of policy detail).

78. *Id.* at 13.

79. See Chayes, *The Burger Court*, *supra* note 42, at 51–52 (1982) (describing analysis of cruel and unusual punishment within the context of prison practices litigation).

80. JEROME MICHAEL & HERBERT WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES, AND COMMENTARIES 10 (1940). They then pose the question, about how convicted criminals should be treated and cite to “three major problems: (1) What methods are best adapted to the various ends of treatment; (2) to what extent do methods which serve one end of treatment also serve or disserve other ends; (3) if one end of treatment must be preferred over others, . . . what should be the order of preference among them?” *Id.* at 11–12. Michael Vitiello's article underscores the complex policy issues of the balance between rehabilitation, incapacitation, and retribution; the governmental structure issues of state and local responsibility; and the political forces influencing sentencing policy. Michael Vitiello, *Reforming California Sentencing Practice and Policy: Are We There Yet?*, 46 MCGEORGE L. REV. (2015) [hereinafter Vitiello, *Reforming California Sentencing*].

81. *Hutto v. Finney*, 437 U.S. 678, 687–88 n.9 (1977).

areas both within and outside the prison system. It caused an improvement in the management of the prison system while simultaneously creating administrative headaches.”<sup>82</sup> The study quoted the Commissioner of the prison system as saying “that the litigation awakened the public to the need for change and, by depicting the court as a scapegoat, prison administrators were able to make necessary improvements . . . that the public might not otherwise have tolerated.”<sup>83</sup> Arguments in favor of California’s Proposition 47,<sup>84</sup> which reforms some sentences, note that it will help relieve prison overcrowding, though they do not mention *Brown v. Plata*.<sup>85</sup>

## II. THE PRISON LITIGATION REFORM ACT

The PLRA is reactive legislation, which its proponents described as correcting abuses in the relief in suits attacking conditions of prison confinement.<sup>86</sup> It represents a pendulum swing from 1980, when Congress enacted the Civil Rights of Institutionalized Persons Act and authorized the Attorney General to sue to remedy a pattern or practice of constitutional violations in prisons and other institutions.<sup>87</sup> Fifteen years later, Congress was concerned, not with abuses in prisons but with remedies that members thought

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82. FISS & RENDLEMAN, *supra* note 2, at 748.

83. *Id.*

84. DEBRA BOWEN, CAL. SECRETARY OF STATE, OFFICIAL VOTER INFORMATION GUIDE, CALIFORNIA GENERAL ELECTION, TUESDAY NOV. 4, 2014, 36, available at <http://vig.cdn.sos.ca.gov/2014/general/en/pdf/complete-vigr1.pdf> (on file with the *McGeorge Law Review*).

85. See *id.* at 38. See also Lopez, *supra* note 53, at 120. Proposition 47 was approved on Nov. 4, 2014. DEBRA BOWEN, CAL. SECRETARY OF STATE, STATEMENT OF VOTE, NOV. 4, 2014, 14, available at <http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/2014-complete-sov.pdf> (on file with the *McGeorge Law Review*). It may lead not only to fewer people being sent to prison but also to release of some current prisoners.

86. See Kyle T. Sullivan, *To Free or Not to Free: Rethinking Release Orders Under the Prison Litigation Reform Act after Brown v. Plata*, 33 B.C. J. L. & SOC. JUST. 419, 431 (2013).

87. The Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997a (2012). Prison conditions litigation followed a trajectory similar to that of school desegregation litigation. See Shima Baradaran-Robison, *Kaleidoscopic Consent Decrees: School Desegregation and Prison Reform Consent Decrees After the Prison Litigation Reform Act and Freeman-Dowell*, 2003 BYU L. REV. 1333, 1334–35 (2003). Initially, the private plaintiffs and the federal courts litigated these cases without federal executive or legislative intervention. See Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 558–59 n.24 (2006). Then some federal courts discovered the “litigating amicus” end run around congressional silence, and they anointed a willing Attorney General with that title. The experience of the Attorney General in litigating these cases revealed the need for legislation, and Congress responded with Titles IV, VI, and IX of the Civil Rights Act of 1964 [relating largely to schools] and the Civil Rights of Institutionalized Persons Act, authorizing federal agencies to combat, through the 1964 Act, school segregation and, through CRIPA, unconstitutional conditions of confinement. Van Swearingen, *Imprisoning Rights: The Failure of Negotiated Governance in the Prison Inmate Grievance Process*, 96 CAL. L. REV. 1353, 1356, 1358 n.27, 1367 (2008). Success of litigation under these acts led to backlash, embodied in President Ford’s anti-busing law and in the PLRA. See Baradaran-Robison, *supra* note 87, at 1351; Lawrence J. McAndrews, *Missing the Bus: Gerald Ford and School Desegregation*, 27 PRESIDENTIAL STUDIES Q. 791, 799 (1997). Notably, however, neither act purported to deny the federal courts the ability to remedy structural constitutional violations.

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went too far.<sup>88</sup> “The appropriations bill in whose ‘fine print’ the PLRA was buried was enacted by a desperate Congress after months of budgetary crisis, and the PLRA’s sparse legislative history attests to the cursory review it received amid the clangor.”<sup>89</sup>

Proponents of the PLRA argued that prison population caps and release orders had endangered public safety.<sup>90</sup> Senator Kay Bailey Hutchinson pointed to the murder of a classmate of hers by a prisoner who had been granted early release from a Texas prison, under a population cap in the *Ruiz* case.<sup>91</sup> Senator Spencer Abraham of Michigan complained, “the result of such litigation is that violent criminals are freed to prey on more victims.”<sup>92</sup> Former U.S. Attorney General William Barr testified: “Most pernicious of all, many courts were actually capping prison populations and forcing the turning-out violent predators back out onto the streets without any real analysis of whether this was essential to alleviate an unconstitutional condition.”<sup>93</sup> Testifying on the same panel as Barr, John J. DiIulio, Jr. insisted “that while some prisons may indeed be overcrowded, and while overcrowding may create in some conditions a need for judicial action, the Nation’s streets are now overloaded with serious convicted criminals who are out on probation and parole. This is not a myth. This is a reality.”<sup>94</sup>

Even after the PLRA was adopted, the chorus continued. Senator Orrin Hatch of Utah observed, “[t]he PLRA provides that prison population caps, which result in revolving door justice and the commission of untold numbers of preventable crimes, should be the absolute last resort.”<sup>95</sup> A lawyer for the Pennsylvania prison system testified that the prison cap had resulted in over 50,000 defendants being

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88. See Sullivan, *supra* note 86, at 431 (describing the design of the PLRA to limit the instances in which federal courts may grant remedies in prison conditions cases).

89. *Id.* at 433.

90. See *id.* at 437–38 (citing the requirement enacted by the PLRA that courts must give great weight to any effects that remedies in prison cases may have on public safety).

91. *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing on S. 3, S. 38, S. 400, S. 866, S. 930, and H.R. 667 Before the S. Comm. On the Judiciary*, 104th Cong. 9–10 (1995) (statement of Sen. Bailey Hutchinson).

92. *Id.* at 4–5.

93. *Id.* at 27. The Attorney General did not list the cases. *Id.* at 26–27. Elsewhere, he had bemoaned premature release of violent offenders, without linking release to prison conditions cases: “We all know that in many jurisdictions many violent offenders are not being sentenced to prison because of the lack of prison space. We know that in many jurisdictions violent offenders sentenced to prison are being paroled or otherwise released as early as possible because of space shortages.” William P. Barr, Attorney General, Remarks at the Attorney General’s Summit on Corrections: Expanding Capacity for Serious Offenders 4 (Apr. 27, 1992), available at <http://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/04-27-1992.pdf> (on file with the McGeorge Law Review).

94. *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing on S. 3, S. 38, S. 400, S. 866, S. 930, and H.R. 667 Before the S. Comm. On the Judiciary*, 104th Cong. 38 (1995) (statement of John J. DiIulio Jr.).

95. *The Role of the U.S. Department of Justice in Implementing the Prison Litigation Reform Act, Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 2 (1996).

freed from pre-trial detention.<sup>96</sup> She added that these defendants committed over 10,000 crimes while free: “These included 79 murders, 959 robberies, 2,215 drug dealing cases, 701 burglaries, 2,248 thefts, and 90 rapes.”<sup>97</sup> Experience under realignment, by contrast, shows no effect on the most serious offenses, but slight increases in other offenses, 3.4% in violent crimes, and 7.6% in property crimes, most notably 24,000 more stolen vehicles.<sup>98</sup>

Section 802 of the PLRA is titled “Appropriate Remedies for Prison Conditions.”<sup>99</sup> It begins by incorporating the equitable rules that the courts had fashioned for structural injunction cases: relief should go no further than necessary to correct the violation of rights of individual plaintiffs, should be narrowly drawn, and should use the least intrusive means necessary to remedy the violation.<sup>100</sup> The same section requires the court to “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief,” a theme that echoes many prior court opinions.<sup>101</sup> This is followed by yet another statement that courts would recognize as obvious: courts shall not “order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law” unless Federal law permits the relief, the relief is necessary, and no other relief is adequate.<sup>102</sup>

In one of the first scholarly analyses of the PLRA Mark Tushnet and Larry Yackle observed:

[S]ometimes, perhaps often, legislators enact statutes to make a point, or to be able to tell their constituents that they have done something about a problem. We call these symbolic statutes. Legislators may win politically by enacting symbolic laws, but courts, bureaucrats, and others affected by the statutes—here, criminals—may lose as they try to work out what the statutes mean. Symbolic statutes are real laws, posing real problems of interpretation and administration.<sup>103</sup>

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96. *Id.* at 48 (statement of Sarah Vandenbraak, Chief Counsel, Penn. Dept. of Corr.).

97. *Id.* at 45. The Supreme Court took note of Philadelphia’s experience, citing testimony of District Attorney Lynne Abraham, but noted lack of documentation of the allegation and differences between the order in Philadelphia and the order in *Plata*. *Brown v. Plata*, 131 S. Ct. 1910, 1942–43 n.11 (2011). The Philadelphia case led to a consent decree in which the prison authorities agreed to reduce the number of prisoners in the Philadelphia prisons from 4,300 to 3,750. *Harris v. Parnsley*, 654 F. Supp. 1042, 1053 (E.D. Pa. 1987).

98. Petrella & Friedmann, *supra* note 66.

99. Codified at 18 U.S.C. § 802 (1997).

100. *Id.* at § 3626(a)(1)(A).

101. *Id.*

102. *Id.* at § 3626(a)(1)(B).

103. Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 2–3 (1997). See also Sullivan, *supra* note 86, at 436 (“The lack of precise meaning in the PLRA’s terms renders it little more than a flaccid judicial test that allows prisoners’ constitutional rights to hang in the balance.”).

Perhaps no provision more tellingly functions as a symbolic statute than §3626(a)(1)(C): “Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.”<sup>104</sup> This provision effectively says nothing. For there is no other language in the act that could possibly be construed as authorization to issue such an order. Yet, while the provision sends negative vibrations regarding orders to construct prisons or raise taxes, it does not limit the ability of courts to enter such orders.<sup>105</sup> In any event, courts have not typically entered such orders. This provision’s rhetoric and emptiness resembles Congress’ response to criticism of some school desegregation decrees. Congress placed in the Civil Rights Act of 1964 this “limit” on federal court jurisdiction: “nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another . . . in order to achieve such racial balance . . . .”<sup>106</sup> Illustrative of the meaninglessness of the provision is the phrase “pupil or student” without providing any clue as to whether the two words were referring to two different types of person.<sup>107</sup> The Supreme Court held that the provision had no impact on the ability of courts to issue race-based orders requiring busing to achieve a unitary school system;<sup>108</sup> the courts had not sought to issue such orders to achieve racial balance.

The provision that is most relevant to sentencing reform is §3626(a)(3), titled “Prisoner Release Order.” The PLRA defines a prisoner release order as one that has “the purpose or effect” of “reducing or limiting the prison population” or “that it directs the release from or nonadmission of prisoners to a prison.”<sup>109</sup> In other words, “prisoner release order” refers to two distinct types of order. One type of “prison release order” does not require the release of prisoners.<sup>110</sup> Further confusing the issue, transfer of prisoners from state prisons to county jails would not fall within the definition of prison release order, because “prison” is defined as a government facility that incarcerates or detains “juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law,”<sup>111</sup> so that jails come within the definition of prison. As far as the

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104. 18 U.S.C. § 3626(a)(1)(C) (1997).

105. *See* 18 U.S.C. §3626(a)(1)(C) (West 2006) (neither granting nor denying courts the authority to order the construction of prisons or the raising of taxes).

106. 42 U.S.C. § 2000c-6(a) (1997).

107. *Id.*

108. *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1, 17–18, 30 (1971).

109. 18 U.S.C. § 3626(g)(4) (1997).

110. *Id.*

111. *Id.* § 3626(g)(5).

PLRA is concerned, transfer from prison to jail is a transfer from one prison to another.<sup>112</sup>

Section 3626(a)(3) perfectly illustrates how the PLRA buttresses the structural injunction in prison cases.<sup>113</sup> It provides that only a three-judge court may enter a prison release order and grants state and local officials and units broad authority to intervene to oppose the imposition or continuance of prison release relief.<sup>114</sup> Implicit in the section is the acknowledgment that a prison release order may be entered, so long as a three judge court enters it. In addition to these procedural changes, this section requires that the court have tried less intrusive relief for a reasonable amount of time before considering prison release.<sup>115</sup> Finally, the court may enter prison release relief only if it 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.”<sup>116</sup>

The legislative history of the PLRA is sparse, due perhaps to its inclusion as Title VIII of a much longer bill. The PLRA originated in a bill ominously titled the Violent Criminal Incarceration Act of 1995.<sup>117</sup> Title III of that bill, bearing the title Stop Turning Out Prisoners, would have provided:

In any civil action with respect to prison conditions, the court shall not grant or approve any relief whose purpose or effect is to reduce or limit the prison population, unless the plaintiff proves that crowding is the primary cause of the deprivation of the Federal right and no other relief will remedy that deprivation.<sup>118</sup>

The Department of Justice had no objection to a provision barring population limits that were not necessary to remedy the violation, but expressed concern about the “primary cause” provision, noting that

It would be exposed to constitutional challenge as precluding adequate remedy for a constitutional violation in certain circumstances. For example, severe safety hazards or lack of basic sanitation might be the primary cause of unconstitutional conditions in a facility, yet extreme overcrowding might be a substitute and independent, but secondary, cause of such conditions. Thus, this provision could foreclose any relief that reduces or limits prison population through a civil action in such a

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112. *Id.* § 3626(a)(3)

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* § 3626(a)(3)(E).

117. H.R. 667, 104th Cong. (1995)

118. *Id.*



case, even if no other form of relief would rectify the unconstitutional condition of overcrowding.<sup>119</sup>

Nothing in the legislative history contradicts this analysis.<sup>120</sup> The Congressional Budget Office analysis of the bill observed: “While prison caps must be the remedy of last resort, a court still retains the power to order this remedy despite its intrusive nature and harmful consequences to the public if, but only if, it is truly necessary to prevent an actual violation of a prisoner’s federal rights.”<sup>121</sup> As the Court recognized in the Arkansas prison case, a comprehensive order may be required because of “the interdependence of the conditions producing the violation.”<sup>122</sup> While the bill as finally passed removes some of the proposed language, it retains the basic concept.<sup>123</sup> While the conference report on the bill does not directly address the issue of prisoner relief, it explicitly recognizes the need for medical treatment of the 80,000 prisoners in our nation’s prisons who “suffer from severe mental illness.”<sup>124</sup> The conferees agree that the care and treatment provided to these individuals is essential to their health and do not intend for any of the provisions in this title to impact adversely on the availability of this care and treatment.”<sup>125</sup> The obvious rejoinder to the claim that no relief other than prisoner release will remedy the violation is that if the violation stems from overcrowding the court could simply order construction of more prisons and could order that the state fund that construction. One might argue that that avenue is blocked by section 3626(a)(1)(C), which provides “[n]othing in this section shall be construed to authorize the courts . . . to order the construction of prisons or the raising of taxes . . . .”<sup>126</sup> However, as discussed earlier in this paper, that provision has no teeth.<sup>127</sup> If it did have teeth, it would mean that a court could order release from prison even if construction of new prisons would alleviate the overcrowding.

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119. 142 Cong. Rec. S2296–2300 (daily e. Mar. 19, 1996) (Statement of John Schmidt). On the other hand, Schmidt thought another provision, read narrowly, raised no substantial constitutional problems: “Proposed 18 U.S.C. 3626(a)(1) in the proposal goes further than the current statute in ensuring that any relief ordered is narrowly tailored. However, since it permits a court to order the “relief . . . necessary to remove the conditions that are causing the deprivation of . . . Federal rights,” this aspect of the proposal appears to be constitutionally unobjectionable, even if it constrains both state and federal courts.” *Id.*

120. *Id.*; see also *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing on S. 3, S. 38, S. 400, S. 866, S. 930, and H.R. 667 Before the S. Comm. On the Judiciary*, 104th Cong. 9–10 (1995)

121. H.R. Rep. No.104–21, at 18 (1995).

122. *Hutto v. Finney*, 437 U.S. 678, 688 (1978).

123. See generally *Prison Litigation Reform Act of 1995*, 18 U.S.C. § 3626 (1997).

124. H.R. REP. No. 104–378, at 167 (1995).

125. *Id.*

126. U.S.C. § 3626(a)(1)(C) (1997).

127. Other provisions, not addressed here, define circumstances when preliminary injunctions are appropriate *Id.* § 3626(a)(2); place time limits on structural injunctions regarding prison conditions *Id.*; limit the use of consent decrees *Id.* 3626(c)(1); and regulate the use of special masters in prison conditions cases *Id.* § 3626(f); and exempt state court decisions based on state law from the limits on court power. *Id.* § 3626(d).

In sum, the PLRA has three faces. It reads as a negative—a limit on judicial power. It strongly implies a positive—that federal courts do have power to fashion structural injunctions to remedy unconstitutional conditions of confinement. It operates as a precatory statute—courts are to take care not to rush into prisoner release orders.<sup>128</sup>

### III. *BROWN V. PLATA*

The Supreme Court upheld the trial court's order capping prison population at 137.5% of capacity and requiring the State of California defendants to formulate and submit for court approval a compliance plan.<sup>129</sup> The order was entered only after the Court had for many years attempted to remedy constitutional deficiencies in inmate medical care and mental health care.<sup>130</sup> As Justice Kennedy wrote for the Court majority, "[t]his case arises from serious constitutional violations in California's prison system. The violations have persisted for years. They remain uncorrected."<sup>131</sup> The two dissenting opinions, by Justices Scalia [joined by Justice Thomas] and Justice Alito [joined by Chief Justice Roberts] disagreed both about the facts and about the construction of the PLRA.<sup>132</sup>

The central problem in *Brown v. Plata* is the application of the principle that the scope of the remedy depends on the nature of the violation.<sup>133</sup> As the dissents in *Plata* point out, most beneficiaries of early release are not members of the plaintiff classes—prisoners with serious mental disorders or other serious medical conditions.<sup>134</sup> The Court majority undertook a two-part analysis: first, would the lower courts have authority to issue their order to reduce prison population if there were no PLRA, and, if so, did the PLRA withdraw that authority?<sup>135</sup>

The majority's conclusion on the first question follows well-established principles for structural injunction cases.<sup>136</sup> As with all equitable relief, the

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128. Cf. William F. Eskridge, *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613 (1991).

129. *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

130. *Id.*

131. *Id.* at 1922.

132. *Id.* at 1950–51 (Scalia, J., dissenting); *Id.* at 1959 (Alito, J., dissenting).

133. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). The Arkansas prison decision relied in part on *Swann*, noting that "[o]nce invoked, 'the scope of a district court's equitable powers to remedy past wrongs is broad, . . .'" *Hutto v. Finney*, 437 U.S. 678, 287–88 n.9 (1978) (quoting *Swann* at 15).

134. See *Plata*, 131 S. Ct. at 1958, 1963.

135. *Id.* at 1923. In an earlier phase of the case, the trial court observed, "[t]he Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626(a)(1)(A), which governs this case, codifies the Court's authority to issue prospective relief that fully remedies constitutional violations, while mandating that the relief not be overly broad." *Plata v. Schwarzenegger*, No. C01–1351 THE, 2005 WL 2932253, at \*25 (N.D. Cal. Oct. 3, 2005) (on file with the *McGeorge Law Review*).

136. See Fiss, *supra*, note 1, at 3.

injunction may issue only if the court finds that the plaintiffs are suffering irreparable injury and that there is no adequate remedy at law.<sup>137</sup> It is commonplace that systemic violations will generally require systemic relief, and that this relief will affect parties and non-parties alike. Generally, the court will begin with an order requiring the defendants to remedy the violation, leaving them to devise suitable remedial mechanisms.<sup>138</sup> If the defendants fail to adopt effective remedial steps, the noose often tightens, with appointment of special masters or even receivers.<sup>139</sup> The *Plata* Court noted that the order to reduce prison populations came after twenty-one years of litigation and twelve years of remedial efforts over the rights of mentally ill prisoners and ten years of litigation and five years of remedial efforts over the rights of those with other serious medical conditions.<sup>140</sup> Thus, although cases challenging conditions of confinement may lead to a sort of indirect sentencing reform in the guise of an order to reduce prison populations, plaintiffs' lawyers should not think that that relief will come quickly. It is pretty much a last resort. And, as the Court pointed out, the order did not require release of prisoners: it required the defendants to "formulate a plan for compliance and submit its plan [for reduction of population] for approval by the court."<sup>141</sup>

The dispute between the majority and the dissents also follows a familiar pattern, exemplified not only in scholarly discussions of the role of the federal courts but also in earlier Supreme Court decisions. One view holds that all courts exist to resolve disputes between parties, a plaintiff and a defendant.<sup>142</sup> They resolve disputes by applying well settled rules, and relief is generally confined to damages or a narrow injunction defined with specificity. Anything beyond this unduly stretches the court beyond the legitimate exercise of power.<sup>143</sup> Justice Rehnquist, for example, dissenting in the Arkansas prison cases, argued that an order limiting solitary confinement to 30 days "does nothing to remedy the plight of past victims of conditions which may well have been unconstitutional."<sup>144</sup> Instead, it "grants future offenders . . . greater benefits than the Constitution requires."<sup>145</sup> The other view, of which Owen Fiss is the primary proponent, is that courts must give content to public values, must act proactively, and will need to

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137. See *Plata* 131 S. Ct. at 1922, 1937.

138. HARRIS & SPILLER, JR., *supra* note 33, at 12.

139. See *id.* at 18.

140. *Plata*, 131 S. Ct. at 1926.

141. *Id.* at 1928.

142. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 398 (1978)

143. *Id.*

144. *Hutto v. Finney*, 437 U.S. 678, 712 (1978) (Rehnquist, J., dissenting).

145. *Id.* at 712. The majority opinion, written by Justice Stevens, responds that the limit on isolation is based on looking at the conditions in isolation cells as a whole, and that "taking the long and unhappy history of the litigation into account, the court was justified in entering a comprehensive order to insure against the risk of inadequate compliance." *Id.*, at 678.

enter into a long, close relationship with the parties in order to ensure that the defendants respect the public values that govern the case.<sup>146</sup>

Justice Scalia's dissent attempts a broadside attack on the structural injunction, arguing that this kind of relief is beyond judicial competence and leads to judges imposing policy preferences on the state.<sup>147</sup> He buttresses his objection by noting that the relief depends upon empirical predictions, which he says are "necessarily based in large part upon policy views."<sup>148</sup> The crux of his critique is: "[S]tructural injunctions depart from [the] historical practice, turning judges into long-term administrators of complex social institutions such as schools, prisons, and police departments."<sup>149</sup> Ironically, Justice Scalia is here engaging in the very practice he criticizes: reaching his legal conclusion based upon his policy views.<sup>150</sup> Those views conflict with the PLRA, which, while placing limits on the judicial imposition of structural injunctions, explicitly exempts from those limits relief that "is necessary to correct the violation of a Federal right"<sup>151</sup> so long as the relief "is the least intrusive means necessary to correct the violation of the Federal right."<sup>152</sup> Indeed, the PLRA also explicitly allows the court to order release of prisoners as a last resort,<sup>153</sup> and authorizes the court to appoint a special master if "the remedial phase will be sufficiently complex to warrant the appointment."<sup>154</sup> Justice Scalia's emphasis on remedying individual rather than structural violations seems to lead to the remarkable conclusion that if the only remedy for denial of constitutionally required medical treatment were an order to release a prisoner, the court should order that person released, no matter how dangerous the prisoner may be.<sup>155</sup> Nonetheless, he concludes his dissent by saying, "[t]he PLRA is therefore best understood as an attempt to constrain the discretion of courts issuing structural injunctions—not as a mandate for their use."<sup>156</sup> Underlying his opinion is his acknowledged disagreement with the Court's "evolving standards of decency" jurisprudence, upon which recognition of a prisoner's right to minimally adequate medical treatment is based.<sup>157</sup>

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146. Fiss, *supra*, note 1, at 30.

147. *Brown v. Plata*, 131 S. Ct. 1910, 1951 (2011) (Scalia, J., dissenting).

148. *Id.* at 1954.

149. *Id.* at 1952.

150. *See id.* at 1951–59.

151. 18 U.S.C. § 3626(a)(1)(B)(ii) (1997).

152. *Id.* § 3626(a)(1)(A).

153. *Id.* § 3626(a)(3).

154. *Id.* § 3626(f)(1)(B).

155. *See Brown v. Plata*, 131 S. Ct. 1910, 1958 (2011) (Scalia, J., dissenting); "Thus, if the court determines that a particular prisoner is being denied constitutionally required medical treatment, and the release of that prisoner (and no other remedy) would enable him to obtain medical treatment, then the court can order his release . . ." *Id.*

156. *Id.*

157. *Id.* at 1951.

The other dissenters, by contrast, disagree with the district court's fact-finding process and with its findings that emerged from that process, and they argue that, under the PLRA, the facts do not support the order to reduce the prison population.<sup>158</sup> In addition, they argue that the lower court should have allowed the state to offer evidence to show that the prisons no longer were violating constitutional rights to minimally adequate medical care, including treatment of mental illness.<sup>159</sup> The majority responded that the issue before the lower court was the adequacy of the remedy for the violations the court had found, and that the court did take evidence on that issue;<sup>160</sup> in any event, the evidence on remedy reflected a continuing violation.

#### IV. THE COURT CORRECTLY RULED IN *PLATA*<sup>161</sup>

Tushnet and Yackle correctly predicted the Court's approach to interpreting the PLRA. "In the main, however, courts will reconcile symbolic laws with the prevailing order . . . [C]ourts are likely to read . . . the PLRA to make only modest adjustments to the policies the judiciary had already adopted. The effect is that the new laws will have no systematic first-order effects . . . The statutes' redundancy in practice may keep the issues that their sponsors purported to address alive and available for further political exploitation."<sup>162</sup>

The PLRA should be construed with three basic points in mind: (1) the scant legislative history of the act suggests that limits on the courts' authority should be narrowly construed; (2) separation of powers requires that the statute be construed in a manner consistent with the judiciary's traditional equitable and constitutional powers as expressed in the judicial development of the law of structural injunctions; and (3) construction of the statute should take into account the status of prisoners in our society. Prisoners' rights are a paradigm of unpopular rights that the elected branches are unlikely to protect. Courts are the main protector of prisoners. While not mentioned in the *Carolene Products* note four,<sup>163</sup> prisoners constitute a discrete and insular minority, and an unpopular and disenfranchised one.

One may compare experience under the PLRA with experience under the fair employment law. That law protects all of us against discrimination based on race, religion, sex, national origin.<sup>164</sup> The Court has narrowly construed the fair employment law's protections, and Congress, prompted by a broad coalition of

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

159. *Id.* at 1959–60.

160. *Plata* 131 S. Court at 1935–36.

161. See also Lauren Salins & Shepard Simpson, Note, *Efforts to Fix a Broken System: Brown v. Plata and the Prison Overcrowding Epidemic*, 44 LOY. U. CHI. L.J. 1153, 1183 (2013).

162. Tushnet & Yackle, *supra* note 103, at 84–85.

163. *United States v. Carolene Products*, 304 U.S. 144, 152–53 n.4 (1938).

164. 78 U.S.C. § 703(a)(1) (1965).

advocacy groups, has amended the law to overturn the narrow constructions.<sup>165</sup> Contrast this with prisoner rights. No such interest group coalition will support relief that is seen as “gambling with the safety of the people of California.”<sup>166</sup> Even where disclosures of cruel and unusual conditions shock the public, meaningful legislative or executive remedial steps are unlikely. This fact is illustrated by the course taken by the political branches after the courts in this case revealed the scope of the intolerable conditions that prevailed in the California prison system. It was the inability of California’s political branches to coalesce around meaningful remedial steps that led to ever more intrusive orders from the Court. This is the typical pattern in cases of systemic cruel and unusual treatment in prisons. In California, the pattern was initially reinforced by the political power of the correctional officers, although Professor Vitiello notes that they have more recently supported some reforms.<sup>167</sup>

Does realignment under A.B. 109 require “the release from or nonadmission of prisoners to a prison?” Realignment simply shifts “criminals who had committed ‘non-serious, non-violent, and non-registerable sex crimes’ from state prisons to county jails.”<sup>168</sup> The injunctions in *Brown v. Plata* do not explicitly require the release of prisoners, although the Supreme Court majority did suggest that the lower court might usefully order the State to “develop a system to identify prisoners who are unlikely to reoffend or who might otherwise be candidates for early release.”<sup>169</sup> The dissenters seem to have assumed that the effect of the district court’s order was to require release of prisoners.<sup>170</sup> For example, Justice Alito referred to “the effect of the massive prisoner discharge on public safety,”<sup>171</sup> while Justice Scalia impressively characterizes the order as “granting the functional equivalent of 46,000 writs of habeas corpus.”<sup>172</sup> The record does not substantiate either statement, and it seems necessary to turn to other sources to find out what the actual effect of the order has been. In any event, the “purpose or effect” language in the definition refers to the purpose or effect of limiting prison population; it does not apply to the second phrase, “directs the release from or nonadmission of prisoners to a prison.”<sup>173</sup> In his unsuccessful request to the Supreme Court to revisit the case in 2013, Governor Brown argued that realignment had taken the less dangerous prisoners from the

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165. See George Rutherglen, *Title VII as Precedent: Past and Prologue for Future Legislation*, 10 STAN. J. C.R. & C.L. 159, 160, 184 (2014).

166. *Brown v. Plata*, 131 S.Ct. 1910, 1967 (2011) (Alito, J., dissenting).

167. Vitiello, *Reforming California Sentencing*, *supra* note 80.

168. *Coleman v. Brown*, 922 F. Supp. 2d 1004, 1014–15 (2013).

169. *Plata*, 131 S.Ct. at 1947.

170. *Id.* at 1956, 1967 (Scalia, J., & Alito, J. dissenting).

171. *Id.* at 1967 (Alito, J., dissenting).

172. *Id.* at 1956 (Scalia, J., dissenting).

173. 8 U.S.C. § 3626(g)(4) (1997).

prison population and that the lower court's order would require early release of dangerous prisoners.<sup>174</sup>

Realignment now is the law of California, so it is arguable that whatever "releases" stem from realignment result from state law, not from the federal court order. Realignment does not release persons from state prison, but it sends to jails convicts who otherwise would have been sent to prison, including parole violators.<sup>175</sup>

Ordinary equitable doctrine supports the court's exercise of its jurisdiction to issue a structural injunction in order to remedy a constitutional violation. To the extent that the PLRA is meant to interfere with the exercise of that discretion, three related principles require narrow construction. Courts should seek to find the statutory meaning that avoids the necessity to decide whether the statute is constitutional.<sup>176</sup> Jurisdiction stripping legislation raises issues of separation of powers and may be unconstitutional.<sup>177</sup> Finally, Congress may not restrict jurisdiction in a manner that denies the underlying constitutional right.<sup>178</sup> Moreover, Congress has generally taken care not to displace jurisdiction of courts to remedy constitutional rights. Thus, Congress has rejected proposals to restrict jurisdiction to protect separation of church and state, the right to an abortion, busing as a desegregation remedy, and enforcement of the *Miranda* decision.<sup>179</sup> This Congressional sensitivity to the constitutional role of the courts is another reason to assume that Congress did not intend to so trammel judicial discretion as to deny constitutional rights. Beneath the surface lies another possible reason to construe such statutes narrowly. The law may reflect a desire of members of Congress, all elected, to deflect to the federal courts public criticism of federal intervention. Judge Frank M. Johnson once referred to the tendency of elected officials to "punt" difficult political issues to the courts.<sup>180</sup>

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174. Jurisdictional Statement (Aug. 9, 2013), *Brown v. Plata*, 131 S. Ct. 1910 (2011). The trial court has tiptoed closer to an order to release prisoners since then. See *Brown v. Plata*, Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013, Deadline, No. C01-1351 THE (E.D. Cal. & N.D. Cal. Three-Judge Court, Feb. 10, 2014), at 3, discussed *supra*, see note 59 and accompanying text.

175. 2011 *Public Safety Realignment Fact Sheet*, *supra* note 57, at 1, 3.

176. See *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001).

177. The extent of Congress' power to restrict judicial remedies remains unclear. *Ex Parte McCordle*, 74 U.S. 506 (1869) "is the only example of a result-oriented restriction on the Supreme Court's appellate jurisdiction sustained by the Supreme Court." JONATHAN D. VARAT, VIKRAM D. AMAR, & WILLIAM COHEN, *CONSTITUTIONAL LAW*, 41 (14th ed. 2013). The authors discuss the Helms Amendment, which would have stripped all federal of jurisdiction to hear challenges to school prayer, a proposal to forbid all federal courts from reviewing the admission in evidence of confessions given without receiving a *Miranda* warning, and other such restrictions, none of which was enacted into law. *Id.* at 42-43.

178. See *Boumediene v. Bush*, 553 U.S. 723, 795 (2008).

179. VARAT, AMAR, & COHEN, *supra* note 177, at 42; See Civil Rights 101, *School Desegregation and Equal Educational Opportunity*, CIVILRIGHTS.ORG (last visited Mar. 23, 2015), <http://www.civilrights.org/resources/civilrights101/desegregation.html> (on file with the *McGeorge Law Review*).

180. Frank M. Johnson, *The Constitution and the Federal District Judge*, 54 TEX. L. REV. 903, 915 (June, 1976) ("[T]he tendency of many state officials to punt their problems with constituencies to the federal

And, as he noted:

We would be naïve to the point of being imbecilic if we didn't realize that the decisions in a lot of these areas have social and political repercussions. But I suppose that was one of the reasons, if not the main reason, federal judges were given tenure—so they could decide cases according to the facts and the applicable law without regard to whether it was a popular or unpopular thing to do.<sup>181</sup>

That kind of rhetorical exercise appears in the PLRA, which provides “[n]othing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.”<sup>182</sup> There is nothing in section 3626 that could be construed in the way the legislation says it shall not be construed.<sup>183</sup> The provision is meaningless, but distances the Congress from any future orders that might require new prison construction or taxes. Notably, that provision is silent on the question of prisoner release orders.<sup>184</sup>

## V. CONCLUSION

One cause of the unconstitutional deprivations of adequate medical care and mental health care in California was prison overcrowding.<sup>185</sup> The causes of prison overcrowding can be stated simply: supply of prison capacity is lower than the demand created by California's criminal justice system. That demand is a function of the incidence of crime, arrest decisions, prosecutor charging decisions, sentencing law, the exercise of judgment by the courts, and the operation of good time credits and parole decisions. Neither the supply side nor the demand side of this equation is directly in issue in a case challenging the constitutionality of prison conditions. It matters not whether demand is high or whether supply is low. What counts is whether the prisons offer their inmates minimally adequate conditions of confinement. But when the inadequacy of the conditions stems in part from the imbalance between demand and supply, the court may be forced to address one or both sides of the equation.<sup>186</sup> Congress

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courts,” quoting Wayne McCormack, *The Expansion of Federal Question Jurisdiction and the Prisoner Complaint Caseload*, WIS. L. REV. 523, 536 (1975)).

181. JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS 328 (1993).

182. 18 USC § 3626(a)(1)(C) (1997).

183. *Id.* at § 3626.

184. *Id.*

185. *See Brown v. Plata*, 131 S. Ct. 2010, 2027 (2011) (stating that an average of one inmate “dies every six to seven days” because of unconstitutional prison medical care).

186. *See id.* at 2023 (describing how overcrowding thwarts efforts to address negative prison conditions).



appears to have concluded that addressing the demand side is less problematic than addressing the supply side, since the latter will strain state budgets and could lead to higher taxes.<sup>187</sup>

It is, however, inevitable that an order requiring that prison population be kept no larger than a stated percent of prison capacity will result either in an increase in capacity or a decrease in prison population. Capacity can be increased either by building new prisons or by using existing facilities outside the prison system. Realignment provides bargain basement increase in capacity. It remains to be seen whether it is good policy. Since realignment did not reduce the prison population to the level required by the court, further proceedings led to the state, acting under pressure from the court, adopting new measures that could result in release of prisoners and sentencing reform:

a ‘Compliance Officer’ who will have the authority to release prisoners should defendants fail to reach one of the benchmarks, with the number of prisoners released being the number necessary to bring defendants into compliance with the missed benchmark. Further, during these two years, defendants have agreed to develop comprehensive and sustainable prison population-reduction reforms, including considering the establishment of a commission to recommend reforms of state penal and sentencing laws.<sup>188</sup>

The defendants in *Plata* confronted a political problem often seen in structural injunction cases. In order to remedy the structural violation of the Constitution it is necessary to change an entrenched structure. Thus, after *Brown v. Board of Education* required the dismantling of the apparatus of racial segregation in the public schools, many Southern officials chose to ignore the law rather than take the politically unpopular steps that *Brown* required.<sup>189</sup> In Alabama this led to the entry of the first statewide structural injunction, requiring state officials to take affirmative steps to desegregate the public schools of the state.<sup>190</sup> The case evolved over time, with the United States, as plaintiff-

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187. See Tushnet & Yackle, *supra* note 103, at (arguing that legislators pass “symbolic statutes” to tell the public they are addressing a problem, but these statutes are difficult to decipher in practice); See also 18 U.S.C. § 3626(a)(1)(C) (1997) (stating that courts do not have the power to raise taxes or to build prisons).

188. *Brown v. Plata*, Order Granting in Part and Denying in Part Defendants’ Request for Extension of December 31, 2013, Deadline, No. C01-1351 THE (E.D. Cal. & N.D. Cal. Three-Judge Court, Feb. 10, 2014), at 3. The compliance officer is to be appointed by the court and could order a stated number of prisoners to be released, using guidelines that screen out dangerous prisoners. See *id.*

189. *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 300 (1955). See also Charles L. Zelden, *From Rights to Resources: The Southern Federal District Courts and the Transformation of Civil Rights in Education, 1968-1974*, 32 AKRON L. REV. 471 (1999) (stating that ten years after the Court’s decision in *Brown*, only a few southern schools were integrated).

190. See Zelden, *supra* note 189, at 507 (describing how one Alabama case ordered desegregation in almost every school in the state). See also *Lee v. Macon Cnty. Bd. of Educ.*, 292 F. Supp. 363, 367 (M.D. Ala.

intervener, monitoring compliance and proposing plans for desegregating students, consolidating schools, merging athletic associations, reassigning teachers, merging transportation routes.<sup>191</sup> When Judge Frank M. Johnson, one of the three judges in *Lee v. Macon County Board of Education*, considered later cases involving conditions of confinement in juvenile facilities and prisons, his experience in *Lee* influenced his remedial rulings.<sup>192</sup>

Experience under *Plata* suggests that Fiss's vision of the structural injunction remains alive and that Rosenberg is wrong in suggesting that prison conditions litigation is constrained where political and social support are lacking<sup>193</sup> and that courts lack implementation power. The defendants in *Plata* until recently fought fiercely against the district court's orders, but the court orders have brought significant change to the California prisons.<sup>194</sup> The court orders may also have influenced public opinion regarding the need for prison reform, by appealing to what Edmond Cahn called "the public sense of injustice."<sup>195</sup> One author concludes that *Brown v. Plata* means: "human dignity and public safety go together; one cannot flourish without the other."<sup>196</sup> Perhaps the strongest recognition of the legitimacy and power of the structural injunction comes from the Congress' enactment of the PLRA. In the face of congressional unhappiness over some of the orders in prison conditions cases, Congress carefully preserved the core of the structural injunction in legislation that was touted as limiting the courts.

Although weak in the context of prison conditions reform, Rosenberg's argument gains salience in the context of sentencing reform.<sup>197</sup> If a prisoner's rights organization believes that sentences are unjust, the lack of clear constitutional rules governing sentencing bodes ill for efforts to reform

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1968) (reinforcing court's order that schools follow "freedom-of-choice method" to continue desegregating schools).

191. See *Lee* 292 F. Supp. at 366.

192. "Time and again citizens have brought to the federal courts, and those courts reluctantly have decided, such basic questions as how and when to make available equal quality public education to all our children; how to guarantee all citizens an opportunity to serve on juries, to vote, and to have their votes counted equally; under what minimal living conditions criminal offenders may be incarcerated; and what minimum standards of care and treatment state institutions must provide the mentally ill and mentally retarded who have been involuntarily committed to the custody of the state." Johnson, *supra* note 180, at 904; See also *Lee* 292 F. Supp. At 364.

193. ROSENBERG, *supra* note 32, 308–311. Indeed, *Lee v. Macon County Board of Education* shows that political and social opposition may serve as a catalyst for federal court orders bringing about structural change. When Governor George Wallace used the powers of his office to obstruct school desegregation, he laid the foundation for the statewide desegregation order in *Lee*.

194. See Nauman, *supra* note 15, at 878–79 (describing the nearly 20-year court battle between California officials and the courts in addressing significant problems in state prisons).

195. Edmond Cahn, *THE WORLD OF LAW: THE LAW AS LITERATURE* 574, 588 (Ephraim London ed., 1960).

196. JONATHAN SIMON, *MASS INCARCERATION ON TRIAL*, 9 (2014).

197. See ROSENBERG, *supra* note 32 at 313 (arguing that focusing on political and social change will address poor prison conditions rather than litigation).

sentencing by litigation, whether in prison conditions cases or elsewhere.<sup>198</sup> As Rosenberg puts it, “The political challenge must be faced directly,” rather than through litigation.<sup>199</sup> Sentencing reform simply to alleviate prison overcrowding is likely to neglect reforming the shortcomings of the sentencing system and instead put in place blunt measures.<sup>200</sup> Of course, if reform through the political process fails the organization seeking reform may have to turn to prison conditions litigation—but that should ordinarily be a last resort.

The prisoner’s rights organization that pursues sentencing reform through litigation to remedy unconstitutional prison conditions may also find that the sentencing reform remedy is short-lived. The Supreme Court has ordered that once the systemic violation of constitutional rights has ended, the court must dismiss the case, absent a showing of continuing threat of violation.<sup>201</sup> The trial court in *Plata* has “consistently demanded a “durable” solution to California prison overcrowding.”<sup>202</sup> Its orders, however, may not be durable. Perhaps the greatest contribution the court may have made would be the creation of a sentencing commission, but at this point all we have is a commitment by the defendants to “consider” one. If California creates a sentencing commission with teeth, then we can say that *Brown v. Plata* did play an important role in sentencing reform.<sup>203</sup>

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198. See Kathi A. Drew & R.K. Weaver, *Disproportionate or Excessive Punishments: Is There a Method for Successful Constitutional Challenges?*, 2 TEX. WESLEYAN L. REV. 1, 1–2 (1995) (explaining that despite guidelines sentences are “widely disparate” and courts have broad discretion to validate sentences imposed by a legislature under the Eighth Amendment to the U.S. Constitution). See also Susanna Y. Chung, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, 68 FORDHAM L. REV. 2351, 2352 (2000) (stating that courts have come to different conclusions about litigation challenging prison conditions under the Eighth Amendment to the U.S. Constitution).

199. ROSENBERG, *supra* note 32, at 313.

200. See Lopez, *supra* note 53, at 121, 123–24 (connecting sentence reform to prison overcrowding and detailing a holistic approach to ensure a successful sentencing commission).

201. *Freeman v. Pitts*, 503 U.S. 467, 491 (1992); *Dowell v. Oklahoma*, 396 U.S. 269, 271 (1969); see also PLRA, 18 U.S.C. § 3626(b), “Termination of Relief” (1997).

202. *Brown v. Plata*, Order Granting in Part and Denying in Part Defendants’ Request for Extension of December 31, 2013, Deadline, No. C01–1351 THE (E.D. Cal. & N.D. Cal. Three-Judge Court, Feb. 10, 2014), at 2.

203. See Lopez, *supra* note 53, at 123–24 (describing the successful elements of a sentencing commission). See Nauman, *supra* note 15, at 882 (stating that *Brown v. Plata* opened the door for prisoner class action suits but it remains unclear how to achieve court-mandated prison reform).