

## NOTES

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# NOTES

## A CONSTITUTIONAL AND POLITICAL HIGH-WIRE ACT: THE ROLE OF *BROWN V. PLATA* IN SOLVING AMERICA'S PRISON CRISIS

Joseph N. Parsons \*

### INTRODUCTION

For the last thirty years, the American prison system has been in a crisis. Since 1980, nearly all fifty states and the federal government have engaged in modifications of their criminal sentencing and administration policies in an effort to become “tough on crime.” These changes include determinate sentencing, limitations on, or outright elimination of, probation and parole, passage of three-strikes laws, and creation of sentencing guidelines. While the efficacy of such policies is debatable, their effect on the United States prison population is not. From 1982 to 2012, the number of incarcerated Americans increased by 500%.<sup>1</sup> The United States now claims the largest prison population in the world, at 2.2 million inmates.<sup>2</sup> On average, it costs the American taxpayer \$31,286 a year to imprison one person.<sup>3</sup> In 2007, the Pew Center on the States estimated that the cost

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<sup>1</sup> PAIGE HARRISON & ALLEN BECK, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, PRISONERS IN 2005, BUREAU OF JUSTICE STATISTICS BULLETIN (2006), available at <http://bjs.gov/content/pub/pdf/p05.pdf>.

<sup>2</sup> *Incarceration*, THE SENTENCING PROJECT, <http://sentencingproject.org/template/page.cfm?id=107> (last visited June 6, 2013).

<sup>3</sup> KRISTIAN HENDRICKSON & RUTH DELANEY, VERA INSTITUTE OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 9 (July 20, 2012), available at [http://www.vera.org/sites/default/files/resources/downloads/Price\\_of\\_Prisons\\_updated\\_version\\_072512.pdf](http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prisons_updated_version_072512.pdf).

for the projected number of new inmates added to the system by 2011 could reach \$27 billion in operating and construction costs.<sup>4</sup> As of September 2011, federal prisons were operating at 139% capacity and are projected to operate at 145% capacity by 2018.<sup>5</sup> Similarly, state-level prisons have expanded beyond capacity. California's prison population, the nation's largest, currently stands at 146% capacity.<sup>6</sup> Pennsylvania was the nation's fastest-growing prison population in 2010, increasing over 500% from 1980.<sup>7</sup> This increase has led to overcrowding. A January 2012 Pennsylvania Department of Corrections report showed that state prisons housed 51,577 in a system designed for 48,502.<sup>8</sup> In addition, the increase in population raised the cost of maintaining and operating the prisons at the expense of other state programs. The 2012-13 Pennsylvania state budget reflects a cost of almost \$2 billion to support the state's prisons, a substantial increase from only a few years earlier.<sup>9</sup> This amount is more than the entire budget for the state's higher education system, which has experienced severe cuts in the past two years.<sup>10</sup>

In an economic climate where the federal and state governments are cutting funding to basic programs due to budget shortfalls, the cost of prison administration is skyrocketing.<sup>11</sup> Legislators, concerned about the public perception

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<sup>4</sup> PEW CHARITABLE TRUSTS, PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA'S PRISON POPULATION 2007-2011 (2007), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/State-based\\_policy/PSPP\\_prison\\_projections\\_0207.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/State-based_policy/PSPP_prison_projections_0207.pdf).

<sup>5</sup> GOV'T ACCOUNTABILITY OFFICE, GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE (2012), available at <http://www.gao.gov/assets/650/648123.pdf>.

<sup>6</sup> DEP'T CORR. REHAB. STATE CAL., WEEKLY REPORT OF POPULATION AS OF MIDNIGHT JANUARY 30, 2013 (Feb. 4, 2013), available at [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/WeeklyWed/TPOP1A/TPOP1Ad130130.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad130130.pdf).

<sup>7</sup> Matt Stroud, *The Great Escape: Legislators trying to dig out from under the state's ever-growing prison budget*, PITTSBURGH CITY PAPER, Apr. 28, 2011, available at <http://www.pghcitypaper.com/pittsburgh/the-great-escape-legislators-trying-to-dig-out-from-under-the-states-ever-growing-prison-budget/Content?oid=1385541>.

<sup>8</sup> PA. DEP'T OF CORR., MONTHLY POPULATION REPORT (Jan. 2012), available at [http://www.portal.state.pa.us/portal/server.pt/document/1223662/mtpop1201\\_pdf](http://www.portal.state.pa.us/portal/server.pt/document/1223662/mtpop1201_pdf).

<sup>9</sup> Governor's Office, *2012-13 Enacted Budget*, <http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2011&sessInd=0&billBody=S&billTyp=B&billNbr=1466&pn=2335>.

<sup>10</sup> Eleanor Chute & Bill Schackner, *Proposed education cuts termed "catastrophic,"* PITTSBURGH POST-GAZETTE, Mar. 9, 2011, available at <http://www.post-gazette.com/stories/local/state/proposed-education-cuts-termed-catastrophic-211559> (proposed spending cuts for education in 2012 total \$1.5 billion).

<sup>11</sup> HENDRICKSON & DELANEY, *supra* note 3, at 2.

that they are “soft on crime,” have shown an acute unwillingness to find ways to decrease prison budgets.<sup>12</sup> Despite the fact that longer sentences and harsher punishments have little to no effect on public safety or recidivism rates, sentences like harsh mandatory minimums and three-strikes laws remain in place.<sup>13</sup> Because of public pressure to crack down on crime, legislators refuse to repeal such laws.<sup>14</sup> At the same time, the Prison Litigation Reform Act of 1996 (PLRA), designed to decrease prison inmate litigation, has greatly hampered the effectiveness of the federal courts in limiting prison overcrowding through consent decrees and injunctions.<sup>15</sup> These forces have combined to produce a staggering increase in America’s prison population and its cost to taxpayers, as those who have the power to reform the system are either unable or unwilling to take action. The issue of prison reform extends past the protection of basic human and constitutional rights. It is one that fundamentally touches every American taxpayer, as well as the health and safety of the general public. As the sole non-political branch, the judiciary has a duty to safeguard the rights of those that the executive and legislative branches refuse to protect. Through Eighth Amendment cruel and unusual punishment claims, federal courts have protected the minimum constitutional rights of prisoners and served as a vital last resort for reducing prison populations in the absence of action by the political branches.<sup>16</sup> In preserving the federal courts as an essential source of remedy for prison overcrowding in *Brown v. Plata*, the Supreme Court recognized the federal judiciary’s reserved but crucial role in this setting.<sup>17</sup>

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<sup>12</sup> See Erik Siebert, *The Process is the Problem: Lessons Learned from United States Drug Sentencing Reform*, 44 U. RICH. L. REV. 867, 913 (2010); Chet Kaufman, *A Folly of Criminal Justice Policy-Making: The Rise and Demise of Early Release in Florida, and its Ex Post Facto Implications*, 26 FLA. ST. U. L. REV. 361, 390 (1999); Vincent Nathan, *Have the Courts Made a Difference in the Quality of Prison Conditions? What Have We Accomplished to Date?*, 24 PACE L. REV. 419, 422 (2004).

<sup>13</sup> See Cecelia Klingele, *The Early Demise of Early Release*, 114 W. VA. L. REV. 415, 421 (2012); Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 94–47 (2001).

<sup>14</sup> See Michael Vitiello, *Reforming Three Strikes’ Excesses*, 82 WASH. U. L.Q. 1, 4-5 (2004); Carl M. Cannon, *America: All Locked Up*, NAT’L J., Aug. 15, 1998, at 1912 (providing examples of successful political “soft on crime” campaigns).

<sup>15</sup> Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America’s Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 141 (2008).

<sup>16</sup> Robert W. Milburn, *Congress Attempts to Remove Federal Court Supervision Over State Prisons: Is § 3626(B)(2) of the Prison Litigation Reform Act Constitutional?*, 6 TEMP. POL. & CIV. RTS. L. REV. 75, 91 (1997).

<sup>17</sup> *Brown v. Plata*, 131 S. Ct. 1910 (2011).

Part I of this note traces the history of federal court oversight of prisons—how federal courts and the Eighth Amendment came to be a source of protection against extreme overcrowding and inhumane conditions, the Supreme Court’s reaction to prisoner litigation, and the aftereffects of the passage of the PLRA. Part II analyzes the Supreme Court’s opinion in *Brown v. Plata*. Part III seeks to determine what effect the *Brown* decision may have on the future of prison litigation and legislation. Part IV explores the options for reducing prison populations advocated for by Justice Kennedy in the *Brown* opinion and by legal scholars, including sentencing reform, early release programs, and the continuing role of the courts.

## I. HISTORY OF FEDERAL COURT OVERSIGHT OF PRISONS

Before the mid-1960s, most courts exercised a non-intervention policy of declining jurisdiction over prison inmate complaints regarding confinement conditions.<sup>18</sup> They viewed convicts as “slaves of the State” with no enforceable rights of their own.<sup>19</sup> Courts also made another argument for nonintervention—separation of powers.<sup>20</sup> Because federal and state statutes delegate exclusive responsibility for prison management to the executive branch, and courts saw control over prison administration as a purely legislative power, judges declined to interfere with such questions.<sup>21</sup> The impetus for prison reform litigation was created by the civil rights litigation revolution that resulted from *Brown v. Board of Education*.<sup>22</sup> That decision created the authority for federal courts to issue civil rights injunctions.<sup>23</sup> Pursuant to such authority, courts looked to the 1944 federal circuit case *Coffin v. Reichard*, in defining the rights of prisoners.<sup>24</sup> According to the *Coffin* court, “a prisoner retains all the rights of an ordinary citizen, except those expressly, or by necessary implication, taken from him by law.”<sup>25</sup>

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<sup>18</sup> Ira P. Robbins, *The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & CRIMINOLOGY 211, 211 (1980).

<sup>19</sup> *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790 (Va. 1871).

<sup>20</sup> Robbins, *supra* note 18, at 212.

<sup>21</sup> *Id.*

<sup>22</sup> Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 552 (2006).

<sup>23</sup> *Id.*

<sup>24</sup> Robbins, *supra* note 18, at 213–14.

<sup>25</sup> *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944).

The Supreme Court's holding in *Swann v. Charlotte-Mecklenberg Board of Education* implicitly recognized the federal judiciary's power to oversee prison reform by granting federal district courts broad equitable power to remedy past wrongs.<sup>26</sup> Federal courts have extended that power to remedial decrees addressing unconstitutional prison conditions.<sup>27</sup> The Eighth Amendment protection against cruel and unusual punishment thus emerged as a source of relief for unconstitutional prison conditions such as overcrowding and insufficiency of medical and mental health facilities.<sup>28</sup> In *Hutto v. Finney*, the Supreme Court maintained the discretion of the federal district courts in fashioning remedies in prison reform litigation.<sup>29</sup> This sweeping power led to federal court oversight of a significant percentage of the nation's prisons through consent decrees and appointment of masters, monitors, or receivers, in an effort to establish constitutional conditions.<sup>30</sup>

However, the Rehnquist Court began to circumscribe judicial authority to oversee prisons beginning with its landmark decision in *Rhodes v. Chapman*.<sup>31</sup> *Rhodes* was the first case where the Court was called upon to define what prison conditions specifically violated the Eighth Amendment.<sup>32</sup> Justice Powell wrote that conditions could not involve "wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment."<sup>33</sup> However, conditions could "deprive inmates of the minimal civilized measure of life's necessities," and remain constitutional.<sup>34</sup> While Justice

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<sup>26</sup> Thomas Julian Butler, *The Prison Litigation Reform Act: A Separation of Powers Dilemma*, 50 ALA. L. REV. 585, 588 (1999). See also *Monroe v. Pape*, 365 U.S. 167 (1961) (holding that abuse of state-delegated authority constituted action under color of state law for purposes of section 1983 jurisdiction under the Civil Rights Act of 1964).

<sup>27</sup> *Id.* at 588.

<sup>28</sup> See Alan J. Kessel, *Prisoners' Rights: Unconstitutional Prison Overcrowding*, 1986 ANN. SURV. AM. L. 737, 737 (1986); *Tillery v. Owens*, 907 F.2d 418 (3d Cir. 1990).

<sup>29</sup> *Hutto v. Finney*, 437 U.S. 678 (1978).

<sup>30</sup> Pamela Rosenblatt, Note, *The Dilemma of Overcrowding in the Nation's Prisons: What Are Constitutional Conditions and What Can Be Done?*, 8 N.Y.L. SCH. J. HUM. RTS. 489, 512-16 (1991).

<sup>31</sup> 452 U.S. 337 (1981).

<sup>32</sup> Susan N. Herman, *Institutional Litigation in the Post-Chapman World*, 12 N.Y.U. REV. L. & SOC. CHANGE 299, 299 (1984).

<sup>33</sup> *Rhodes*, 452 U.S. at 347.

<sup>34</sup> *Id.*

Powell confirmed that courts have the responsibility to hear Eighth Amendment prison conditions claims using a totality of conditions method, he warned that courts should not determine how best to operate a correctional facility.<sup>35</sup> This sentiment mirrored the concern that Justice Rehnquist expressed in *Bell v. Wolfish*, that courts should be sensitive to states' interests in punishment, deterrence, and rehabilitation, and exercise substantial deference to prison administrators.<sup>36</sup>

In *Turner v. Safley*, a decision that was superseded by statute but is continually quoted (in Justice Scalia's *Brown v. Plata* dissent, among other places), Justice O'Connor warned that relying on courts to police the nation's prisons was dangerous and inappropriate.

[C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform . . . the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree . . . . Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.<sup>37</sup>

With these cases, the Court began to defer to states and prison officials as the primary authorities on matters of prison administration.<sup>38</sup> The Court did, however, reaffirm the responsibility of the courts "to scrutinize claims of cruel and unusual confinement," using a totality of conditions analysis.<sup>39</sup>

Despite the *Rhodes* and *Bell* decisions, some courts remained dedicated to using their authority to remedy extreme cases of overcrowding, which became

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<sup>35</sup> *Id.* at 346–67.

<sup>36</sup> *See* 441 U.S. 520, 547 (1979).

<sup>37</sup> *Turner v. Safley*, 482 U.S. 78, 84–85 (1987) (internal citations omitted).

<sup>38</sup> David J. Gottlieb, *The Legacy of Wolfish and Chapman: Some Thoughts About "Big Prison Case" Litigation in the 1980's*, in *PRISONERS AND THE LAW* 2–3 (Ira Robbins ed., 1985).

<sup>39</sup> *Rhodes*, 452 U.S. at 352.

increasingly common as prison populations ballooned throughout the 1980s and 1990s.<sup>40</sup> In an effort to constrain frivolous prison inmate litigation and further curtail federal courts' ability to exercise authority over prison administration, Congress passed the Prison Litigation Reform Act (PLRA) in 1996.<sup>41</sup> The Act limits relief for prison conditions, requiring that it "extend no further than necessary to correct the violation of the federal right of a particular plaintiff or plaintiffs."<sup>42</sup> A court may not approve such relief unless it 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."<sup>43</sup> Courts must also substantially consider any adverse impact on public safety or the operation of the criminal justice system caused by the relief.<sup>44</sup> The act severely limits courts' ability to issue prisoner release orders and settlements such as consent decrees and allows termination of court-ordered relief after two years.<sup>45</sup> The PLRA has been extremely effective in accomplishing its objectives—between 1995 and 2000, the number of states with less than 10% of their prison populations under court supervision more than doubled.<sup>46</sup> By 2006, the number of prisoner lawsuits filed fell 60%, despite a huge increase in prison population.<sup>47</sup>

## II. THE *BROWN V. PLATA* DECISION

*Brown v. Plata*, as heard by the Supreme Court in 2011, was the combination of two federal cases from California.<sup>48</sup> *Coleman v. Brown*, the first case that was eventually consolidated into *Brown v. Plata*, was filed in 1990 by a group of seriously mentally ill California state prison inmates alleging Eighth Amendment violations due to a chronic lack of mental health treatment.<sup>49</sup> The District Court for

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<sup>40</sup> See French v. Owens, 777 F.2d 1250 (7th Cir. 1985); Tillery v. Owens, 907 F.2d 418 (3d Cir. 1990); Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982); Toussaint v. Yockey, 722 F.2d 1490 (9th Cir. 1983).

<sup>41</sup> 18 U.S.C. § 3626 (2012).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> David Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1456 (2010); 18 U.S.C. § 3626 (2012).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1922 (2011).

<sup>49</sup> *Coleman v. Wilson*, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995).



the Eastern District of California ruled in favor of the inmates and appointed a special master to oversee a remedial plan.<sup>50</sup> In 2007, the special master reported that mental health treatment in California prisons was deteriorating again due to sustained overcrowding.<sup>51</sup>

The second case, *Plata v. Brown*, was filed in 2001 by a group of California inmates alleging serious deficiencies in prison medical care.<sup>52</sup> The state stipulated to a remedial injunction by a California state court but failed to comply. In response, the California Supreme Court, in 2005, appointed a receiver to oversee the task of improving medical care standards.<sup>53</sup> The Court found that increasingly inadequate conditions caused one California inmate to needlessly die every week.<sup>54</sup> In 2008, the receiver released a report describing the chaotic effect of massive overcrowding on the prison medical system.<sup>55</sup> The report cited overcrowding as the cause of an increase in infectious disease, prison violence, and resulting lockdowns that kept seriously ill prisoners from receiving medical care.<sup>56</sup> Overcrowding also led to a decrease in the quality of medical staff, as prison jobs became less and less desirable.<sup>57</sup>

Pursuant to these reports, the *Coleman* and *Plata* plaintiffs requested that the district courts convene a three-judge panel under the PLRA to order a reduction in California's prison population.<sup>58</sup> The three-judge panel issued a 184-page opinion with substantial findings of fact and ordered the state of California to decrease its prison population to 137.5% capacity within two years.<sup>59</sup> The court instructed the

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<sup>50</sup> *Id.* at 1324.

<sup>51</sup> *Brown*, 131 S. Ct. at 1926.

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

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1927.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1927–28.

<sup>59</sup> *Id.* at 1928.

State to prepare and submit a population reduction plan for approval.<sup>60</sup> California then appealed the case to the United States Supreme Court.<sup>61</sup>

In a 5-4 decision, the Supreme Court upheld the order of the California three-judge panel.<sup>62</sup> Prior to *Brown v. Plata*, the Supreme Court had not moved from its stance of substantial deference to the judgment of prison administrators.<sup>63</sup> In his opinion, Justice Kennedy reserved a measure of power for the federal courts as a final authority on maintaining constitutional prison conditions—“The PLRA should not be interpreted to place undue restrictions on the authority of federal courts to fashion practical remedies when confronted with complex and intractable constitutional violations. Congress limited the availability of limits on prison populations, but it did not forbid these measures altogether.”<sup>64</sup> While the PLRA was meant to limit the power of federal courts to a “remedy of last resort,”<sup>65</sup> its drafters recognized that the courts could be the only safeguard of prisoners’ constitutional rights and an important last resort to limit overcrowding.

The Court also approved of the nature of the remedy fashioned by the three-judge panel.<sup>66</sup> Justice Kennedy recognized that, because of the budget crisis in California—a problem endemic to many other states—constructing new prisons to reduce capacity pursuant to the court order was not a realistic option.<sup>67</sup> Therefore, adequately reducing the prison population would require a combination of changes to the parole system, sentencing reform, use of good-time credits, and other creative options.<sup>68</sup> Because the order gave state prison administrators complete flexibility in choosing their remedy for overcrowding, the judges did not overstep their authority in simply ordering a population reduction. The standard of deference to prison officials set by the PLRA and the Rehnquist Court therefore remained intact. The Court made sure to reemphasize this standard, writing, “When *necessary* to ensure compliance with a constitutional mandate, courts may enter

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

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1947.

<sup>63</sup> See *Beard v. Banks*, 548 U.S. 521 (2006); *Shaw v. Murphy*, 532 U.S. 223 (2001).

<sup>64</sup> *Brown*, 131 S. Ct. at 1937.

<sup>65</sup> H.R. REP. NO. 104-21, at 25 (1995).

<sup>66</sup> *Brown*, 131 S. Ct. at 1947.

<sup>67</sup> *Id.* at 1928.

<sup>68</sup> *Id.*

orders placing limits on a prison's population.<sup>69</sup> However, by also quoting original prison reform cases like *Hutto v. Finney*—that had first established the federal courts' power to remedy Eighth Amendment prison violations when the government failed to do so—the Court suggested that the rules established during that era still had a place in the post-PLRA order.<sup>70</sup> The *Brown* decision was thus a vital ruling for the federal courts' prison reform powers.

Justice Kennedy made another important distinction in the *Brown* opinion. Under the PLRA, an order for relief from a federal court must be narrowly drawn, extend no further than necessary to correct the violation, and must be the least intrusive means necessary to correct the violation.<sup>71</sup> Because a population reduction order would affect many prisoners other than the plaintiffs themselves, California argued that such an order would violate the PLRA's express requirement that the relief be as narrowly tailored as possible.<sup>72</sup> Justice Kennedy rejected that argument, countering, “[a] narrow and otherwise proper remedy for a constitutional violation is not invalid simply because it will have collateral effects. Nor does the PLRA require that result.”<sup>73</sup> The violations found by the two court-appointed officials were systemic, and therefore a systemic remedy was appropriate.<sup>74</sup> If the Court had ruled adversely on this point, the ability of federal courts to issue remedies for overcrowding would have been destroyed. To ensure that his statement about the validity of systemic remedies would not result in a path around the PLRA's requirements, Justice Kennedy emphasized that a court issuing such an order has a “continuing duty and responsibility to assess the efficacy and consequences of its order.”<sup>75</sup> Thus, while upholding a broad remedial population cap order, the Court made a point to keep its ruling within the boundaries established by the PLRA.

Underscoring the fragility of the five-justice majority in *Brown* and the tenuous position of federal courts' remedial powers over prison overcrowding, Justice Scalia provided a visceral dissent to the ruling. Advocating for the complete dismantling of federal court oversight of prisons, Scalia wrote, “[t]he institutional

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<sup>69</sup> *Id.* at 1929 (emphasis added).

<sup>70</sup> *Id.* at 1928, 1944.

<sup>71</sup> See 18 U.S.C. § 3626 (2006).

<sup>72</sup> See *Brown*, 131 S. Ct. at 1939.

<sup>73</sup> *Id.* at 1940.

<sup>74</sup> See *id.*

<sup>75</sup> *Id.* at 1946.

reform the District Court has undertaken violates the terms of the governing statute, ignores bedrock limitations on the power of Article III judges, and takes federal courts wildly beyond their institutional capacity.”<sup>76</sup> For Scalia, the weakest point of the majority opinion was its decision that collateral effects on other prisoners did not violate the PLRA’s narrowly tailored requirements. He stated, “Courts may not order the release of prisoners who have suffered no violations of their constitutional rights, merely to make it less likely that it will happen to them in the future.”<sup>77</sup> Scalia also pointed out that structural injunctions, allowing courts to supervise a litigant’s conduct for a long period of time after their ruling, have not been historically within the powers of the federal courts.<sup>78</sup> He restated the concerns of the Rehnquist Court and the drafters of the PLRA in observing that structural injunctions “turn judges into long-term administrators”<sup>79</sup> and require judges to make “broad empirical predictions necessarily based in large part upon policy views—the sort of predictions regularly made by legislators and executive officials, but inappropriate for the Third Branch.”<sup>80</sup> Justice Alito denounced the majority for its lack of respect for state sovereignty and its willingness to put aside public safety in approving the release of tens of thousands of convicted criminals.<sup>81</sup> Due to the fragility of the majority in *Brown* and the fact that the decisions of the Rehnquist Court and the PLRA echo Scalia’s and Alito’s concerns about the ruling, these arguments cannot be taken lightly and may prevail in future decisions.

### III. THE EFFECT OF *BROWN V. PLATA*

As the first major prison overcrowding decision since the PLRA was passed in 1996, *Brown* is an important reflection of the Supreme Court’s view of the rights of prisoners and the post-PLRA role of the federal courts in prison oversight. The Court reserved federal courts’ right to cap prison populations as a remedy of last resort—a stricter standard than before the PLRA’s existence, but an important distinction. The Court did not simply use public safety as a barrier to the release of prisoners, as legislatures and several decisions previously had; it expressly allowed that in extreme circumstances, public safety concerns may be outweighed by severe

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<sup>76</sup> *Id.* at 1951.

<sup>77</sup> *Id.* at 1958.

<sup>78</sup> *See id.* at 1953.

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

<sup>80</sup> *Id.* at 1954.

<sup>81</sup> *See id.* at 1959.

prison overcrowding. According to Justice Kennedy, the obligation of the courts to enforce constitutional rights creates judicial authority to fashion appropriate remedies, even if intrusion into the realm of prison administration is required.<sup>82</sup> Such intrusion is appropriate where the constitutional violations in question are “complex and intractable” and have continued for a substantial period of time, remaining uncorrected.<sup>83</sup> While the Court strongly emphasized the necessity of the PLRA’s role in limiting judicial intervention and leaving the manner of release to the discretion of public officials, it also reasserted the right of federal courts to oversee and regulate their injunctions. The arguments presented by the Scalia and Alito dissents concerning the threshold of judges’ constitutional powers and the primacy of public safety are strong and will certainly be revisited by the Court. Considering, however, the overwhelmed state of America’s prisons and the *Brown* Court’s acknowledgement of that reality, the decision may have a significant effect on the role courts play in maintaining Eighth Amendment rights of inmates and in prescribing methods of release.

Justice Kennedy’s opinion was also a surprisingly overt political statement from the Court.<sup>84</sup> He included pictures and vivid descriptions of the conditions in the California prison system—prisoners awaiting medical treatment in 12-by-20-foot cages for hours, over 50 prisoners sharing a toilet, delays in mental health treatment lasting years, an extraordinarily high suicide rate, and telephone booth-sized “dry cages” that held suicidal prisoners.<sup>85</sup> Justice Kennedy highlighted recent findings on mass incarceration and public safety, showing that a handful of states have reduced their prison populations without a commensurate increase in crime.<sup>86</sup> He also pointed to research showing that mass incarceration could actually increase criminal behavior, as inmates are severed from their communities and subjected to a vast network of criminals and overcrowded, abusive conditions.<sup>87</sup> The message

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<sup>82</sup> Marie Gottschalk, *Brown v. Plata and Dealing with America’s Overcrowded Prisons*, THE NEW REPUBLIC (June 8, 2011, 12:00 AM), <http://www.newrepublic.com/article/politics/89575/prison-overcrowding-brown-plata-supreme-court-california>.

<sup>83</sup> *Brown*, 131 S. Ct. at 1950.

<sup>84</sup> *Id.* at 1942–43 (“Expert witnesses produced statistical evidence that prison populations had been lowered without adversely affecting public safety in a number of jurisdictions, including . . . Wisconsin, Illinois, Texas, Colorado, Montana, Michigan, Florida, and . . . Washington.”).

<sup>85</sup> *Id.* at 1942.

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

<sup>87</sup> *Id.*

behind these themes is clear. Because the courts properly remain a remedy of last resort for truly inhumane prison conditions, it will take a broad-based political movement to make America's prison system cost-effective, efficient, and rehabilitative.

#### IV. REDUCING PRISON POPULATIONS

The *Brown* Court suggested several actions for inclusion in the state's remedial plan. Under the PLRA, a court is required to consider the public safety consequences of its order and structure and monitor its ruling to mitigate such consequences.<sup>88</sup> Justice Kennedy provided several examples of population reduction methods proven to have a negligible impact on public safety—expansion of good-time credits, diversion of low-risk offenders to community programs such as drug treatment, day reporting centers, and electronic monitoring, and punishment of technical violators through community-based programs.<sup>89</sup> However these suggestions, and the remedial powers of the courts themselves, are temporary solutions at best for a systemic, nationwide problem. The size of America's prison population can only be permanently reduced by directly focusing on the number and length of sentences.<sup>90</sup> While the *Brown* decision was important in showing that federal courts maintain a vital role in safeguarding Eighth Amendment rights for prisoners, it has not reshaped the legal landscape, as the flood of prisoners' rights cases in the 1960s and 1970s did. To solve the problem of prison overcrowding and stem the rampant costs to the American taxpayer, a much broader scheme of reform is needed.

##### A. Sentencing Reform—The Long Term Solution

A major cause of the prison population explosion in the past 30 years, according to Erwin Chemerinsky, is the “enormous political pressure[] in recent years to increase penalties for criminal offenses.”<sup>91</sup> During the 1980s and 1990s, legislators responded to a public call to reduce crime rates by enacting harsher

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<sup>88</sup> 18 U.S.C. § 3626 (2006).

<sup>89</sup> *Brown*, 131 S. Ct. at 1942–43.

<sup>90</sup> See Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 316 (2009) (using the iron law of prison populations—which states that the size of a prison population is completely determined by how many people go to prison and how long they stay—to show that fewer incarcerations and shorter sentences are the only way to solve the problem of mass incarceration).

<sup>91</sup> Erwin Chemerinsky, *The Essential but Inherently Limited Role of the Courts in Prison Reform*, 13 BERKELEY J. CRIM. L. 307, 309 (2008).

sentencing schemes and increasing the incarceration rate.<sup>92</sup> The most significant of these schemes were three-strikes laws, which drastically increase penalties for repeat offenders.<sup>93</sup> Since California enacted its original version in 1994, some form of three-strikes law has been enacted by 23 other states and by the federal government.<sup>94</sup> All 50 states and the federal government have adopted one or more mandatory sentencing laws.<sup>95</sup> Legislators around the country have also substantially increased the use of mandatory minimum sentences in an effort to be seen as “tough on crime.”<sup>96</sup> While proponents argue that three-strikes laws keep career criminals off the street and thus save taxpayer dollars by avoiding future trials and re-incarceration costs, they have actually led to excessively punitive sentences<sup>97</sup> and spiraling corrections costs due to the heavier punishments.<sup>98</sup> By adhering to the rigid stance that a third crime (or felony) committed, no matter the severity, results in extremely severe punishment, three-strikes laws are ineffective in identifying truly dangerous repeat offenders.<sup>99</sup> Instead, they have resulted in a huge increase in non-violent offenders serving decades or life in prison.<sup>100</sup> As they age, these offenders grow less dangerous and more expensive to incarcerate.<sup>101</sup> Increased use of mandatory minimum sentencing has had a similar effect.<sup>102</sup> The

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<sup>92</sup> Michael Simons, *Sense and Sentencing: Our Imprisonment Epidemic*, 25 ST. JOHN'S J. C.R. & ECON. DEV. 153, 158–60 (2010).

<sup>93</sup> Chemerinsky, *supra* note 91, at 309.

<sup>94</sup> See Daniel Kessler & Steven D. Levitt, *Using Sentence Enhancements to Distinguish Between Deterrence and Incapacitation*, 42 J.L. & ECON. 343, 351 (1999).

<sup>95</sup> *Id.* at 350.

<sup>96</sup> Mascharka, *supra* note 13, at 936.

<sup>97</sup> See *Lockyer v. Andrade*, 538 U.S. 63 (2002) (Court upheld a sentence of life without parole under California's Career Criminal Punishment Act for a defendant who was convicted of two counts of petty theft and had never committed a violent crime); *Ewing v. California*, 538 U.S. 11 (2003) (Court upheld a life sentence under California's Career Criminal Punishment Act for a defendant who was convicted of stealing golf clubs).

<sup>98</sup> Vitiello, *supra* note 14, at 3–4.

<sup>99</sup> See *id.* at 12–13.

<sup>100</sup> See *id.* at 13–15.

<sup>101</sup> Mike Males & Dan Macallair, *Striking Out: The Failure of California's "Three Strikes and You're Out" Law*, 11 STAN. L. & POL'Y REV. 65, 68 (1999).

<sup>102</sup> Mascharka, *supra* note 13, at 935–36.

logical result of over a decade of these sentencing practices is a prison population boom and state budget crises.

Because of political pressure to crack down on crime, legislators lack the political will to vote for any bill that decreases the punishment for a crime or implements alternatives to prison sentences.<sup>103</sup> Chemerinsky correctly points out that the political influences “all push in one direction.”<sup>104</sup> The pressure to remain tough on crime “operates as a one-way ratchet, providing for ever-greater criminalization and punishment, and never less.”<sup>105</sup> It is similarly unpopular for legislators to allocate funding for prison administration.<sup>106</sup> While prisoners cannot advocate for themselves, powerful correctional officers unions and the prison industrial complex lobby state legislatures for longer sentences, not better conditions for the inmates they oversee.<sup>107</sup> However, since the economy plunged into recession in 2008, a different kind of political pressure has exerted itself on legislators: the pressure to find ways to cut government spending. As states begin paying for the additional costs of mounting numbers of three-strikes defendants sentenced to long prison terms,<sup>108</sup> budget crises could force legislators to address the prison spending issue.<sup>109</sup> Legislators may soon have to choose between “responsible reform and the risk of being labeled soft on crime.”<sup>110</sup>

Legislators seeking to fiscally reform prison administration may be aided by the type of information highlighted by Justice Kennedy in *Brown*. As his opinion showed, both scholars and government leaders are finding ways to decrease sentences and prison populations without the accompanying increase in crime warned of by Justices Scalia and Alito.<sup>111</sup> According to recent studies, a shorter

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<sup>103</sup> Chemerinsky, *supra* note 91, at 309–10.

<sup>104</sup> *Id.* at 310.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197, 1203 (2008).

<sup>108</sup> The elderly comprise the fastest-growing and most expensive demographic of the prison population. See Carrie Abner, *Graying Prisons: States Face Challenges of an Aging Inmate Population*, THE COUNCIL OF STATE GOVERNMENTS 9–10 (Nov./Dec. 2006), <http://www.csg.org/knowledgecenter/docs/sn0611GrayingPrisons.pdf>.

<sup>109</sup> Vitiello, *supra* note 14, at 5–6.

<sup>110</sup> *Id.* at 6.

<sup>111</sup> See *Brown*, 131 S. Ct. at 1942–43.



term of imprisonment does not correlate with a greater risk of recidivism.<sup>112</sup> In fact, being imprisoned at all may actually make it more likely that an offender will recidivate.<sup>113</sup> Based on these studies, there is real incentive for legislators to refocus sentencing laws on punishing true threats to public safety and to create alternatives to mass incarceration that would better rehabilitate low-level offenders at a lower cost to the taxpayer.

Several states have used sentencing commissions to effectively reform their sentencing laws and reduce prison populations.<sup>114</sup> A major reason for the success of sentencing commissions is that they are shielded from the political pressure experienced by legislators to crack down on crime.<sup>115</sup> Many sentencing laws are reactionary in nature, passed in response to an isolated, high-profile crime or string of criminal acts.<sup>116</sup> Sentencing commissions, aided by experts and statistics and populated by non-elected officials, produce more efficient, personalized sentencing standards.<sup>117</sup> In creating a sentencing commission, legislatures may instruct the commission to balance certain concerns, such as budgetary restrictions and public safety goals.<sup>118</sup>

In 1990, North Carolina created a sentencing commission that expanded community-based sanctions and recommended sentencing guidelines based on the individual offender's crime and record.<sup>119</sup> The state adopted the commission's recommendations and was able to increase the number of violent offenders being sentenced to lengthy prison terms while decreasing the prison population at large and saving billions of dollars.<sup>120</sup> Virginia recently created a sentencing commission

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<sup>112</sup> See Daniel S. Nagin et al., *Imprisonment and Reoffending*, in 38 CRIME AND JUSTICE: A REVIEW OF RESEARCH, 115, 169, 183 (Michael Tonry ed., 2009).

<sup>113</sup> Paul Nieuwbeerta et al., *Assessing the Impact of First-Time Imprisonment on Offenders' Subsequent Criminal Career Development: A Matched Samples Comparison*, 25 J. QUANTITATIVE CRIMINOLOGY 227 (2009).

<sup>114</sup> Amanda Lopez, *Coleman/Plata: Highlighting the Need to Establish an Independent Corrections Commission in California*, 15 BERKELEY J. CRIM. L. 97, 121–22 (2010).

<sup>115</sup> See *id.* at 120.

<sup>116</sup> See *id.* at 114.

<sup>117</sup> Vitiello, *supra* note 14, at 26–27.

<sup>118</sup> See *id.* at 36.

<sup>119</sup> See Lopez, *supra* note 114, at 121.

<sup>120</sup> *Id.*

that concluded the state was incarcerating too many older, non-violent offenders.<sup>121</sup> The commission increased sentences for young, violent offenders and moved non-violent offenders to community-based programs.<sup>122</sup> In these ways, states have “implement[ed] tough-on-crime policies, while also reducing crime rates and saving taxpayer dollars.”<sup>123</sup> Insulation from the political and legislative process has proven crucial to the success of sentencing reforms.<sup>124</sup> Sentencing commissions are an effective way to achieve this end and create a system of sentencing more focused on risk-assessment and less on punishment.<sup>125</sup>

One area that is often identified by scholars as ripe for sentence reduction is low-level drug offenses.<sup>126</sup> Some states have been able to save money by cutting back on sentences for drug possession and providing treatment programs for offenders.<sup>127</sup> Elimination of mandatory sentencing for drug crimes has also been suggested by scholars.<sup>128</sup> Since drug addiction, not financial gain, is the motivation for many drug offenses, scholars and some legislators have advocated that treating addiction—rather than simply punishing the addict with incarceration—is a more effective way to reduce crime.<sup>129</sup> In Arizona, California, Missouri, and New York, legislatures have enacted sentencing schemes that punish violent drug offenders while directing people arrested for possession and other non-violent drug crimes toward treatment instead of prison.<sup>130</sup> These schemes make a critical distinction between drug dealing, a criminal justice issue, and drug addiction, a public health issue.<sup>131</sup> Because drug treatment programs are on average much less expensive than

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<sup>121</sup> *Id.* at 122.

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

<sup>123</sup> *Id.*

<sup>124</sup> Vitiello, *supra* note 14, at 26–27.

<sup>125</sup> See Jordan M. Hyatt et al., *Reform in Motion: The Promise and Perils of Incorporating Risk Assessments and Cost-Benefit Analysis into Pennsylvania Sentencing*, 49 DUQ. L. REV. 707 (2011).

<sup>126</sup> See Andrea Lofgren, Note, *A Sign of Things to Come? Drug Policy Reforms in Arizona, California, and New York*, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 773, 774–75 (2011).

<sup>127</sup> See *id.* at 775.

<sup>128</sup> See Clear & Austin, *supra* note 90, at 317.

<sup>129</sup> See Jonathan Lippman, *Idea, How One State Reduced Both Crime and Incarceration*, 38 HOFSTRA L. REV. 1045, 1050 (2010).

<sup>130</sup> See Lofgren, *supra* note 126, at 775; Vitiello, *supra* note 14, at 5 n.24.

<sup>131</sup> See Lofgren, *supra* note 126, at 775.

the cost of incarceration, these sentencing reforms have saved money while decreasing prison populations.<sup>132</sup>

*B. Early Release—The Short Term Solution*

In the absence of wholesale sentencing reform, which may take years or decades, what other avenues exist to stem prison overcrowding? States have enacted various forms of legislation attempting to reduce prison populations without affecting the length of sentences.<sup>133</sup> These laws include prioritization of law enforcement objectives, changes in parole and probation systems to allow more early releases, and accelerated release programs.<sup>134</sup> However, studies have shown that minor alterations cannot make a significant enough difference for sustained reduction in prison populations.<sup>135</sup> Often, the problem is that those granted the discretionary authority to release prisoners early rarely exercise it.<sup>136</sup> This does not mean that early release programs cannot contribute appreciably to reduction in prison populations. Again, the key is to isolate public figures from the political retribution associated with releasing prisoners.<sup>137</sup> By introducing risk assessments for prisoners eligible for parole, Mississippi gave its parole officers an “evidence-based,” rather than discretionary, method of granting parole.<sup>138</sup> In response, parole officers increased the parole rate to 50%, saving the state \$200 million in the first six months of the increase.<sup>139</sup> Promoting scientifically endorsed methods of increasing early release percentages is an effective way of limiting public outcry and its associated political pressures.<sup>140</sup> Implementing guidelines for assessing

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<sup>132</sup> See *id.* at 788–90 (reporting that in Arizona, the cost of incarceration is \$35,000 a person while the cost of drug treatment is only \$17,000; in New York, the cost of incarceration is \$45,000 while the cost of drug treatment is only \$15,000).

<sup>133</sup> See Clear & Austin, *supra* note 90, at 313.

<sup>134</sup> See *id.* at 314.

<sup>135</sup> See Don A. Andrews & Craig Dowden, *Managing Correctional Treatment for Reduced Recidivism: A Meta-Analytic Review of Programme Integrity*, 10 LEGAL & CRIMINOLOGICAL PSYCHOL. 173 (2005); Mark W. Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 ANN. REV. L. & SOC. SCI. 297 (2007).

<sup>136</sup> Klingele, *supra* note 13, at 442–44.

<sup>137</sup> See *id.* at 445.

<sup>138</sup> *Id.* at 444.

<sup>139</sup> See *id.* at 444–45.

<sup>140</sup> See *id.* at 445.

inmates' risk to the public and other factors results in parole decisions that are more fair and reasonable, attracting less criticism than completely discretionary decisions.<sup>141</sup> Such a strategy would also decrease the number of inmates that do not receive parole or probation merely because of the serious nature of the crime they committed, regardless of the likelihood that they would commit another crime.<sup>142</sup>

Another mechanism needed for early release programs to be effective is the presence and funding of community-based alternatives to incarceration.<sup>143</sup> These programs differ from prison in that they do not isolate inmates from their families and communities, providing for a more rehabilitative method of punishment.<sup>144</sup> They also signal to the public that inmates who are released early are not getting a free pass but a supervised chance at success outside the prison walls.<sup>145</sup> Reduction of the length of community supervision, parole, and probation terms would save costs and negligibly affect recidivism rates, according to studies.<sup>146</sup> Reduction of other penalties to a fine, restitution, or community service has been a successful cost-cutting measure in other countries.<sup>147</sup> Re-imprisonment of technical violators of probation and parole has little or no impact on recidivism.<sup>148</sup> Punishments for technical violations could thus be limited to fines or community service, while reserving re-imprisonment for those who commit another crime.<sup>149</sup> Ultimately, however, alternatives to incarceration are a short-term solution to a problem that demands bigger action. These strategies are meant to be a supplement to sentencing reform, not a replacement.

### C. *A Lasting Role for the Courts*

*Brown v. Plata* reserved a role for the federal courts in ordering reductions of prison populations pursuant to Eighth Amendment cruel and unusual punishment claims. Many judges and scholars agree that this is a necessary and proper

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<sup>141</sup> See *id.* at 453.

<sup>142</sup> *Id.* at 450–51.

<sup>143</sup> *Id.* at 448.

<sup>144</sup> *Id.* at 424.

<sup>145</sup> *Id.* at 448.

<sup>146</sup> See Clear & Austin, *supra* note 90, at 318.

<sup>147</sup> See Sally T. Hillsman, *Fines and Day Fines*, 12 CRIME & JUST. 49, 50 (1990).

<sup>148</sup> Clear & Austin, *supra* note 90, at 317–18.

<sup>149</sup> *Id.*

safeguard against uncontrolled increases in the nation's incarcerated population.<sup>150</sup> Chemerinsky prescribes a limited oversight power for the courts as the best approach.<sup>151</sup> Courts can and should have the authority to limit overcrowding, order improvements in medical and mental health care, and end unconstitutional and inhumane practices.<sup>152</sup> They may order injunctions on prisons, but because it is difficult for judges to make and enforce standards, the injunctions should be limited to prohibiting illegal conduct.<sup>153</sup> In terms of oversight, courts may appoint a monitor or receiver, but great deference must be given to prison authorities.<sup>154</sup> Former federal district court Judge Harold Baer, who heard numerous prisoners' rights claims during his time on the federal bench, endorses the use of consent decrees between prisons and inmates.<sup>155</sup> Judge Baer used this method to control standards on Rikers Island.<sup>156</sup> As a result of consent decrees, periodic court oversight, and injunctions, New York City's jails—once among the most overpopulated and degrading in the country—are now mostly in conformity with constitutional guarantees.<sup>157</sup>

As Justice Kennedy demonstrated in his *Brown* opinion, judges can also influence the direction of policy when they rule on prison cases. When hearing prisoners' rights cases, judges rely on the testimony of expert correctional administrators and often appoint those individuals as monitors or receivers in charge of oversight.<sup>158</sup> In fact, judges do not manage prison oversight at all—that is the sole task of the appointed monitor or receiver.<sup>159</sup> Judges do not rule on these cases simply by applying common knowledge; they adhere to a model created by

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<sup>150</sup> See Schlanger & Shay, *supra* note 15, at 139.

<sup>151</sup> See Chemerinsky, *supra* note 91, at 307.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 315.

<sup>154</sup> See *id.* at 316.

<sup>155</sup> See Harold Baer & Arminda Bepko, *A Necessary and Proper Role for Federal Courts in Prison Reform: The Benjamin V. Malcolm Consent Decrees*, 52 N.Y.L. SCH. L. REV. 3 (2008).

<sup>156</sup> *Id.* at 4.

<sup>157</sup> *Id.*

<sup>158</sup> Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications*, 24 PACE L. REV. 433, 437 (2004).

<sup>159</sup> *Id.* at 440.

experts and attempt to bring prisons closer to that model with their rulings.<sup>160</sup> They typically adopt policies expressly recommended by prison officials, or policies encouraged by experts that prison officials have been slow to implement.<sup>161</sup> Prisoners' rights litigation has led the corrections profession to put a greater emphasis on professionalism, improve its organization and efficiency, and create national standards for prison officials.<sup>162</sup> It has placed prison reform in the public consciousness, an important first step to actual change.<sup>163</sup> While the PLRA's numerous limitations on inmate litigation have curtailed judges' influence and reduced the number of successful prison inmate cases,<sup>164</sup> there is no indication of a reduction in the volume of judicial activity in prison reform.<sup>165</sup> As exemplified by *Brown v. Plata*, the courts' role in the management of America's prisons is vital—to keep prison issues in the public discourse, eliminate degrading conditions, hold prison administrators accountable, and act where legislators lack the will or desire.

## V. CONCLUSION

The United States prison system is at a crossroads. As a result of three decades of lengthened punishments, mandatory minimums, and three-strikes laws, prison populations have grown exponentially. Where legislators once thought that there would always be ample room in state and federal budgets to satisfy the needs of the prison industrial complex, the economy's recent struggles have proven otherwise. American prisons' mass incarceration problem has become everyone's problem. It not only impacts the taxes we pay, it negatively impacts public safety and decreases the amount states can spend on public education and other services. Proponents of "tough on crime" sentencing reforms cannot even claim that they have had a sizeable impact on crime rate.

The Supreme Court's ruling in *Brown v. Plata* will not be transformative for American prisons on its own. By reserving the power of the federal courts to remedy prison overcrowding in the aftermath of the PLRA, the Court merely recognized the ability of judges to act as a final barrier to unconstitutional prison

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 442.

<sup>162</sup> *Id.* at 443–45.

<sup>163</sup> *Id.* at 450–52.

<sup>164</sup> Schlanger & Shay, *supra* note 15, at 140.

<sup>165</sup> See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

conditions. The true influence of *Brown v. Plata* lies in its attention to what is needed to actually change America's prison system. Justice Kennedy's powerful opinion recognizes the need for legislative action in the absence of judicial authority. A more personalized, intelligent, and efficient method of sentencing must be put in place. Reasonable and fair early release programs, along with rejuvenation of parole and probation systems, may also prove effective. Courts must maintain the ability to remedy extreme cases of prison overpopulation and work with prison administrators to implement better policies. *Brown v. Plata* may simply fade in the face of the PLRA and legislative inaction. More likely, though, it will lead to a greater awareness of what is going on in America's prisons, how that impacts every American, and what is necessary for real change.