April 4 (Class 9): Prison Litigation: Courts as a Source of Oversight & Reform

What is the role of courts in criminal justice reform? This class examines the relationships among courts, the administration of prisons, and prisoners’ rights. We do so by considering the work of William Wayne Justice, the federal judge involved in the Texas prison litigation (Ruiz v. Estelle); the development of congressional efforts to limit courts’ authority (the Prison Litigation Reform Act—PLRA); and the contemporary conflict over the most recent prison conditions case to reach the Supreme Court (Plata v. Brown). Our focus is on the various actors endowed with constitutional, legislative, administrative, political, and practical powers to oversee the administration of prisons. How did Judge Justice understand the role of judges in prison conditions cases? Is it different than in other kinds of cases? What were the concerns that animated the PLRA? How has the PLRA affected the balance of authority among judges, administrators, and legislatures? What are the metrics to assess the impact of litigation on conditions? The daily lives of inmates and administrators? The resources available to prisons?


The Origins of *Ruiz v. Estelle*

William Wayne Justice*

On March 21, 1990, the Honorable William Wayne Justice, as Herman Phleger Visiting Professor of Law, delivered a speech to the Stanford community on the origins of *Ruiz v. Estelle*, the case in which Judge Justice, after exercising unusual initiative in ordering consolidation of prisoner complaints into a class action, finding counsel for the plaintiff class, and ordering the U.S. Justice Department to appear as amicus curiae, held that state penitentiary treatment and conditions in Texas were unconstitutionally cruel. The Stanford Law Review is pleased to reprint the text of Judge Justice's remarks.

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I would like to take up two issues in my remarks today. The first may be termed historical. I will begin by briefly setting out the sequence of events that led to the initiation of the class action on behalf of prisoners incarcerated in Texas prisons in the case of *Ruiz v. Estelle*.\(^1\) In most class action litigation, of course, the plaintiffs provide the impetus for maintaining the proceeding as a class action. In contrast, the decision in *Ruiz* to classify and consolidate the representative petitions that became the basis on which the case was litigated was my own.

The remainder of my remarks are an attempt to analyze and explain why it seemed necessary for the court to exercise its own initiative to bring about this consolidation. I wish to emphasize at the outset, however, that my desire to explain the court's conduct in *Ruiz* does not amount to an apology. I am much less interested in searching out precedents, in the traditional legal sense of that term, than I am in elaborating some broader analytical or theoretical scheme for making sense of the court's response to the hundreds of ill-drafted, handwritten prisoner's petitions that poured into the clerk's office in the Eastern District of Texas. I believe it is important to elaborate this broader means of understanding *Ruiz* because the problem the Texas prison case posed for our judicial system—specifically, how our courts can provide meaningful access to legal institutions for the most disadvantaged members of our society—is one of the most important and intractable issues that face judges, policymakers, and concerned lawyers of this generation. And there is no reason to expect the issue to become less important or less intractable during your careers in the law.

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* Judge, United States District Court, Eastern District of Texas.

For me, the Ruiz litigation began before I went on the bench, when I was United States Attorney for the Eastern District of Texas. At that time, I would occasionally attend hearings on prisoner petitions held by my predecessor, the Honorable Joe W. Sheehy.

At this point, I should make clear that most units of the Texas Department of Corrections (TDC) are in the Southern District of Texas. The Beto, Coffield, and Eastham units, however, are situated within the Eastern District, in Anderson and Houston counties. For a good many years, prisoners in those units had been filing suits, primarily on individual bases, protesting the conditions of their confinement. Judge Sheehy had developed a rather summary form of hearing to deal with these cases.

The procedure, which I observed on several occasions, was as follows: The plaintiff would be sworn, and Judge Sheehy would ask him to tell his story. The prisoner would then give, to the best of his ability, a narrative account of the incident or incidents that had led him to file his complaint. Frequently this narrative would be difficult to follow, since most prisoners were, as prisoners are now, poorly educated, with only a rudimentary acquaintance with the English language.

The defendant state official would then have the opportunity to cross-examine the prisoner-plaintiff. Unlike the plaintiffs in these hearings, the defendants were always represented by counsel; as state officials, they would have the services of an assistant attorney general of the State of Texas.

Next, Judge Sheehy would ask the plaintiff if he had any evidence, other than his own testimony, to present to the court. Plaintiffs may have had such evidence from time to time, but I never saw any presented at the hearings I attended. Defendants, on the other hand, usually would produce both witnesses and documentary evidence to bolster their accounts.

After the witnesses for the defense were examined, the plaintiff typically would attempt some halting cross-examination. This was more likely to be "backchat" and denial, rather than recognizable cross-examination. At the conclusion of the defendant's presentation, Judge Sheehy would ask the plaintiff if he had any rebuttal evidence to present. Invariably, the plaintiff would not. Judge Sheehy would then dismiss the plaintiff's complaint from the bench.

I was struck at the time by the summary nature of these proceedings, but I want to emphasize that I did not then find anything in them to be a denial of due process. Nor, on the basis of what I heard in those hearings, did I have any sense of wrongdoing on the part of TDC. My attitude toward TDC at that time was probably similar to that of most Texans: I thought that the system was efficient, and while occasional problems common to all large organizations might exist, no grave, systemic difficulties existed.

Since, as I have said, I did not find any failure of due process in the procedure Judge Sheehy had worked out, I adopted his approach when I went on the bench. However, the process appeared quite different to me as participant than it had when I was merely an observer. The message was
brought home forcibly to me that prisoners who had no legal representation simply could not effectively present their grievances. Pro se prisoners, like other pro se litigants, had great difficulty in framing any kind of pleading, and knew nothing of the Federal Rules of Civil Procedure or the Federal Rules of Evidence. Their status as prisoners further exacerbated some of their difficulties. It would have been difficult, if not impossible, for them to engage in any discovery, had they even known how to do so.

Occasionally, I was tempted to try to get counsel for these prisoners, but to do so would have been very difficult. I could not order lawyers to represent them, and since at that time neither 42 U.S.C. § 1988 nor the Equal Access to Justice Act was on the books, the prospect that an attorney would receive any fee for services rendered in such a case was extremely dim.

I noted that the procedural problems of these cases were likely to produce occasional substantive injustices as well. Despite their unartful expression, plaintiffs would occasionally say some things which had the ring of truth. Since my father had been a county district attorney and a criminal defense lawyer, and since I had been both a criminal defense lawyer and a prosecutor, I had been around jails since I was a boy. Having represented more than a few thieves, bootleggers, rapists, and murderers, I was not disposed to regard as the gospel truth everything a miscreant told me, even—and perhaps particularly—if he said it under oath. However, since my experience also encompassed any number of sheriffs, policemen, and jailers, I was not likely to be wholly credulous as to claims made by peace officers, either. I have been lied to and I have been told the truth, and I think that I can usually tell the difference. Therefore, I was greatly troubled when I found myself, as I sometimes did, dismissing prisoner suits that sounded credible. However, given the inept presentations and lack of documentary evidence in these cases, ruling in these prisoners’ favor clearly would have been courting reversal.

I was more than troubled by this state of affairs; I was offended by it. Given the fact that TDC was always represented by counsel, while prisoners had to appear pro se, and given the consequences that inevitably followed, one side of a controversy was routinely going unheard. This, it seemed, and still seems, did not accord with the goals and aspirations of our adversarial system of justice.

I made some initial, and very minor, attempts to correct the balance in these proceedings by, in effect, cross-examining the state’s witnesses myself. This had little effect on the outcome of the cases, but apparently a fairly large effect on my reputation among prisoners. As William Bennett Turner pointed out in an article on prisoner suits in the Harvard Law Review, ‘The ‘liberal’ decisions and reputations of individual judges appear to encourage

As I read through these baskets of correspondence, I developed a strong suspicion that vast wrongs were being systematically perpetrated on the prisoners, and I began to wonder whether such wrongs could be addressed in a judicial forum.

At about this time, I suppose as a result of the reputation for judicial activism I was acquiring, I was invited to address a seminar being conducted at Southern Methodist University (SMU) on prisons and prison reform. I made a brief speech outlining the problems I had encountered with habeas petitions and § 1983 complaints and recommending the development of some method for attorney appointment in these cases. One of the other speakers at the seminar was William Bennett Turner, whom I have already mentioned. Mr. Turner was already deeply involved in institutional reform litigation through his work for the NAACP Legal Defense Fund. Mr. Turner's presentation made an excellent impression on me.

After outlining my feelings about the inadequacy of the process available in these cases at the SMU seminar, I decided that I wanted to see at least one case where the plaintiffs were adequately represented. Accordingly, I directed my law clerks to inventory the complaints we had received, and to determine which type of complaints arose most frequently.

The complaints fell into four main areas. The first problem we could identify was brutality. Many of the petitions alleged harsh and violent behavior on the part of wardens, guards, staff, and convict overseers who were called "building tenders." The building tenders, who became one of the central issues in the Ruiz litigation, were convicts—frequently of the most brutal sort—whom the prison officials informally vested with all manner of supervisory and disciplinary powers, and who exercised that power through fear, physical assault, and the use of weapons tacitly or expressly approved.5

A second area about which many prisoners filed complaints was the lack of medical care available to TDC prisoners. TDC's medical care was woefully insufficient in both its staffing and its facilities. Ill-trained TDC and inmate staff had to deal with most routine medical problems, making judgments, prescribing treatments, and in extreme cases, even performing minor surgery that doctors ought to have done.6

The third major area of controversy was the grotesque overcrowding of many of the units, a condition that grew worse over time. In many cases,

6. See id. at 1307-28 (discussing Texas prison health care).
two or three—in extreme cases, even five—prisoners were being housed in cells designed for single occupancy. This overcrowding resulted in unsanitary conditions, great stress for the prisoners, tension, and many assaults.\(^7\) The prisoners were being subjected to the same crowding experiment ethologists have performed on the common gray rat, *Rattus norwegicus*, and the experiment was having the same results.

The fourth topic of complaint was summary discipline. Prison officials allegedly were meting out various penalties to prisoners either without any disciplinary hearings or with hearings bereft of any semblance of due process.\(^8\)

After my law clerks identified these four major categories in the prisoner complaints, I directed them to find a representative plaintiff for each kind of claim presented. One of the plaintiffs selected was David Ruiz. (It later developed that TDC had, in a manner of speaking, preselected David Ruiz as a plaintiff, when in November 1971, he was one of the writ-writers placed in what was called the "eight-hoe squad" at the Wynne Unit. Considering the fact that the creation of the eight-hoe squad concentrated in one place the most experienced jailhouse lawyers in the Texas prison system, it may be questioned how prudently the TDC officials who created it had acted.\(^9\))

Once the cases were sorted out, they were ordered consolidated for trial. I then tried to get in touch with William Bennett Turner at his office at the Inc. Fund in San Francisco, but it developed that he was in Katmandu, Nepal, on a mountaineering holiday. When Mr. Turner returned from his Himalayan excursion, I was able to get hold of him; he agreed to represent the plaintiffs and thereupon filed an amended complaint in the consolidated civil action styled *Ruiz v. Estelle*.\(^10\)

As a result of his preliminary investigation of the case, Mr. Turner determined that it ought to be maintained as a class action. Accordingly, he filed a motion for class certification, the class to consist of all present and prospective TDC prisoners. After an exceedingly short hearing, I granted the motion.\(^11\)

Given Mr. Turner's experience and the resources on which he could draw, the prisoners in this action clearly would be far better represented than any I had heard heretofore. However, there was still a great disparity between the resources for discovery and investigation available to the plaintiff class and those available to the TDC.

I attended the Fifth Circuit Judicial Conference each year, where I al-

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7. See *id.* at 1277-85 (discussing crowding in TDC facilities).
8. See generally *id.* at 1346-56 (discussing TDC disciplinary procedures).
9. The "eight-hoe squad" was a punitive work detail of prisoners who were assigned to labor in the prison unit's fields using implements such as hoes and shovels. For a discussion of the Wynne unit's squad, see STEVEN J. MARTIN & SHELDON EKLUND-OLSON, TEXAS PRISONS: THE WALLS CAME TUMBLING DOWN 50-58 (1987). See also *Ruiz*, 503 F. Supp. at 1367-70 (discussing official harassment of litigious prisoners).
ways met with my friend, Judge Frank M. Johnson, Jr. Judge Johnson had already spent several years dealing with the Alabama prison litigation, which also centered on the issue of overcrowding.\textsuperscript{12} We began to compare our prison cases, and Judge Johnson told me that I would be well-advised to involve the United States in the litigation. I asked him how he had accomplished that in the Alabama case, and he told me that he had ordered the Department of Justice to appear as amicus curiae.

I asked Judge Johnson to provide me with a copy of the order he had entered, and using it as a model—or, as we call it in East Texas, a "go-by"—I issued the same kind of order in \textit{Ruiz}.\textsuperscript{13} The order gave the United States all the discovery powers of a party to the litigation. The Department lawyers were apparently astonished at what they found after investigation—sufficiently astonished that the United States filed a motion to intervene as a party plaintiff.\textsuperscript{14}

The appearance of the United States as amicus had already so disturbed the balance of forces as to cause TDC some unease. But when the United States, with all the resources at its disposal, moved to intervene, it is fair to say that the State of Texas began to raise hell. The state petitioned the Fifth Circuit for a writ of mandamus to set aside my order granting the intervention. The writ was denied,\textsuperscript{15} and the state thereupon petitioned the United States Supreme Court for certiorari. Certiorari was denied, with three justices dissenting.\textsuperscript{16} In a somewhat unusual manner, the dissenting justices filed a rather blistering opinion written by then-Justice Rehnquist, questioning the authority of a district judge to do what I, and Judge Johnson before me, had done.\textsuperscript{17} To obviate the concerns the Rehnquist dissent raised, Senator Edward Kennedy drafted a specific statute granting such authority to the district court.\textsuperscript{18}

These, from my perspective, are the origins of the \textit{Ruiz} litigation. I have no hesitation in accepting that what I did can properly be called judicial activism. I was surely not passive. No one told me to consolidate those cases. No one filed a motion for an attorney. I simply wanted to know what was going on. To borrow a phrase from my colleague on the Seventh Circuit, Judge Posner (who borrowed it from Colonel North's attorney, Brendan Sullivan), I was not a potted plant.\textsuperscript{19}

Having made these historical observations, I will turn to the questions


\textsuperscript{14} Motion of United States to Intervene, Ruiz v. Estelle, No. H-78-987 (S.D. Tex. Dec. 6, 1974).

\textsuperscript{15} In re Estelle, 516 F.2d 480 (5th Cir. 1975), cert. denied sub nom. Estelle v. Justice, 426 U.S. 925 (1976).


\textsuperscript{17} Id.


they raise. To be blunt, does a court have the authority to do the things I did? In a professedly adversarial court system, to what extent can a judge wield inquisitorial powers?

These questions derive their force in large measure from the traditional way in which we understand our legal system to operate. As Professor Owen Fiss has outlined that understanding, the typical lawsuit involves two antagonistic parties of roughly equal strength who become embroiled in a dispute and who then turn to a third party, a stranger to them and their dispute, asking the stranger to resolve the quarrel. The impartiality of the judge is symbolized, as Professors Judith Resnik and Dennis Curtis have noted in their study of the iconography of justice, by the blindfold that the goddess of justice traditionally wears. Our legal culture has instilled in us a very powerful conviction that the judge must act without fear or favor, showing no preference for either side.

Americans tend to assume that an impartial judge must be a passive judge, to whom the case is brought and before whom the case is constructed by the parties. The court—particularly a federal district court—has relatively little discretion in deciding whether to hear a case. If the court does not have either personal or subject matter jurisdiction, it may not hear the case. If it has both, the court has scant ability to refuse the case. Chief Justice Marshall put the point plainly in *Cohens v. Virginia*:

> The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given.

Professor Abram Chayes adumbrates the duties of the judge in the traditional model. The judge is bound, according to Professor Chayes, “to decide only those issues identified by the parties, in accordance with the rules established by the appellate courts, or, . . . the legislature.” The judge, in the traditional model, is also not to assume the role of an investigator, but to remain passive. He or she is conceived to have “little or no responsibility for the factual aspects of the case or for shaping and organizing the litigation for trial.”

We live in a judicial world that the traditional model cannot always account for—a world of special masters and of bankrupting fines which would have seemed strange to Chief Justice Marshall (although both are judicial

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22. 19 U.S. (6 Wheat.) 264, 404 (1821).
24. *Id.*
responses to Andrew Jackson's alleged reaction to *Worcester v. Georgia*25). Though the increasing prevalence of institutional reform litigation has eroded the hegemony of the model, it continues to inform most of our thinking about judges. For this reason, it is a very serious matter when political officials contend, as they frequently have done in the course of such institutional reform litigation, that the judiciary has stacked the deck against them. Such assertions, if credited, would deeply injure the reputation of the judges in the eyes of all serious persons.

However, the traditional conception of the lawsuit is deficient in several important respects. First, our legal culture is prone to conflate and confuse two independent issues—the issue of arriving at substantively correct decisions and the issue of adequate procedural structure. For this reason, the procedural structure that most assume is the ordinary way in which courts operate is inadequate as a means of making sense of the operation of a court in proceedings in which the parties are not in at least roughly equal positions, or in proceedings in which the remedy is complex and requires continual judicial superintendence long after the judgment is entered.

We can better analyze the conflation, and indeed the confusion, of procedural structure and the necessity of a fair hearing for all parties if we consider the difference between our insistence on a passive judiciary and the approaches of other Western judicial systems. Judicial neutrality is a goal of most, if not all, such systems. Judicial passivity is not. Within the American judicial system, the powers of a federal judge to examine witnesses and otherwise engage directly in the proceedings are broader than the powers of many state court trial judges. Moreover, an English trial judge, who also sits within the confines of the Anglo-American adversarial system, has powers to comment on evidence that are breathtaking in their expansiveness, at least if the highly entertaining "Rumpole" stories by John Mortimer, Q.C., are to be given any credence.26 The *juge d'instruction* of the inquisitorial Continental systems has yet more authority to engage, and ordinarily does engage, in the investigation of matters which come before him. Nevertheless, in all these cases the judge is charged with a duty to be an impartial, neutral arbiter.

More important problems with the traditional model become visible, however, where the model's assumptions about the parties or the kinds of remedies necessary to fix things no longer hold. These are the types of problems with the traditional model that Professors Fiss27 and Chayes28 discuss. I want to distinguish here the procedural difficulties I encountered at the outset of the Ruiz litigation from those which developed later on in the course of the case. In the remedial phase of the case, I noted all the

27. See Fiss, supra note 20.
28. See Chayes, supra note 23.
problems with institutional reform litigation which Professors Fiss and Chayes have detailed. I know all too well the difficulties that a court encounters in enforcing orders that compel the reform of an entrenched bureaucracy, and the ways in which those encounters with official intransigence transform the functions of the judge. But those are not the problems I faced at the outset of the case. If I was an activist judge in the initial phases of the case, that activism really came from a straightforward commitment to the traditional goals of adjudication, in a situation in which the necessary balance of forces that underlies the traditional concept of adjudication did not exist.

Far more important than our commitment to the image of the passive judge is our commitment to the idea that the judge’s job in the case before him is to get the right answer. Thus, in Greenholtz v. Nebraska Penal Inmates, the United States Supreme Court held that “[t]he function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions.”29 Another way of saying this, in Professor Herbert Wechsler’s words, is that the duty of the judge is “to decide the litigated case and to decide it in accordance with the law . . . .”30 Whether you call it avoiding the risk of erroneous decisions, deciding the litigated case, doing substantive justice to the parties, or simply getting to the truth, a judge has a duty to get right answers.

It was, however, difficult if not impossible for me—as it would have been for any judge—to reconcile my duty to decide cases on their merits and to get to the truth of the matters asserted in the courtroom, with the ordinary procedural strictures under which judges routinely operate. If I had continued with the routine I had adopted from Judge Sheehy, I would have spent the rest of my judicial career presiding over hearings that had the trappings of due process, but that were void of meaning.

That, I think, would not have fulfilled the requirements of due process. And I draw some consolation from the thought that such hearings would not have received much support from the leading process-oriented critic of institutional reform litigation, the late Professor Lon Fuller of Harvard. While I do not agree with all of Professor Fuller’s analysis in his essay on “The Forms and Limits of Adjudication,” I do agree with the “one simple proposition” from which he starts:

[T]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor. Whatever heightens the significance of this participation lifts adjudication toward its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself.31

29. 442 U.S. 1, 13 (1979).
It seems clear, if we take Fuller's simple proposition seriously, that a minimal requirement for the judicial process to be legitimate is that both sides have an opportunity to be heard. Yet it would be ludicrous to contend that there was any real participation by the prisoners in the hearings Judge Sheehy and I held prior to the Ruiz case. The prisoners were not gagged, nor were they prevented from speaking. But the bare possibility of their presenting "proofs and reasoned arguments" did not afford them a means for doing so. The prisoners had, as I have said before, no earthly idea of how to present their contentions in a legally significant way. To allow them to present their grievances in a halting and semi-literate fashion may have offered them some formal right of participation, but that participation would have been, and indeed was, a nullity. Hence, as Professor Fuller puts it, untutored participation would have "destroy[ed] the integrity of adjudication itself."32

Because one of the parties was deprived of effective participation in such hearings, I was unable to perform the central duty of a judge. I could not have decided those cases on their merits. The facts might well have been as the petitioners alleged, and the law on their side. But absent a coherent presentation of the facts and the law, I could not have so found. This defect was not accidental or adventitious. The judicial process was systematically malfunctioning.

The central proposition of process-based theorists like Fuller and Wechsler is that the judicial process, when properly functioning and adhered to by judges, is a means to assure correct legal results. This suggests, contrariwise, that a process that ceaselessly generates results of dubious merit must itself have some serious internal defect. My fellow Texan, Professor Charles Black, made essentially this point in his celebrated response to Professor Wechsler's neutral principles argument. He asked how we would respond to a legal argument that tried to square the fourteenth amendment with the realities of segregation, and he then suggested that the only reasonable response was laughter.33 There is, after all, a world which exists independently of the way courts see it. And if courts cannot see that world correctly, then the judges need new pairs of glasses.

Think of it this way. If systematic violations of the eighth amendment rights of prisoners were occurring, how could I remain passive and still become aware of those constitutional violations? When asked that way, the question refocuses the way you conceive of constitutional government. You cease to ask whether the passive role is being maintained or neutral principles adhered to. Instead, you begin to ask whether a system of government that might permit systematic violations of constitutionally guaranteed rights to go unnoticed and unaddressed is, in reality, constitutional. The answer to that question is plainly no. Hence, any judge who develops a strong suspi-

32. Id.
cion, as I did, that the integrity of the judicial process—that is, its capacity for generating decisions that reflect the legal and factual merits of the cases before it—has been violated, is obliged to do something to move the process back onto track.

In Ruiz, I was faced with three choices. First, I could have continued to hear large numbers of prisoner petitions for the rest of my judicial career with full knowledge that such petitions were destined to fail. Second, I personally could have attempted to right the balance in the hearings I was conducting. Professor Fuller addresses the main problem with that alternative when he tries to imagine what an arbiter would have to do without lawyers as advocates:

[The arbiter must put aside his neutrality and permit himself to be moved by a sympathetic identification sufficiently intense to draw from his mind all that it is capable of giving—in analysis, patience and creative power. When he resumes his neutral position, he must be able to view with distrust the fruits of this identification and be ready to reject the products of his own best mental efforts. The difficulties of this undertaking are obvious. If it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once.34]

Finally, I could find some means of classifying and consolidating the complaints and seeking out an attorney with the resources to present the prisoners' case adequately.

The first choice would have been wearisome, absurd, and a violation of my duty as I understood it. The second would have transformed me from judge to advocate, a transformation which would not only have been unseemly, but which also would have violated the integrity of the court.

It was not my business to be an advocate. But it was emphatically my business to find an advocate, because the truth could not have been ascertained without one. This concern with enabling the inarticulate to tell their stories is the central theme of what is called the "due process revolution," but the concern is older than the Warren Court. It can be found in the opinion of the court in Powell v. Alabama,35 the Scottsboro Boys case, written by that redoubtable conservative, Justice Sutherland:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . He requires the guiding hand of counsel at every step in the proceedings against him . . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.36

The right to appointed counsel has, of course, progressed by fits and starts, from capital cases in Powell to felony cases in Gideon v. Wainwright37

34. Fuller, supra note 31, at 382-83.
35. 287 U.S. 45 (1932).
36. Id. at 68-69.
to all criminal cases involving imprisonment in *Argersinger v. Hamlin*.

The contours of the right in civil cases are uncertain, thanks to the Supreme Court's ruling in *Lassiter v. Department of Social Services*. But the general applicability, and indeed necessity, of the right to appointed counsel in *Ruiz* was clear.

Due process of law does not require that all those who feel aggrieved be able to get what they want from a court. But it does require that when such a person comes to court with a potentially cognizable claim, he be given a chance to say what he wants. Often enough, as any lawyer knows, the right to say what one wants, to get the ear of the court, is itself what a complainant most desires. The right to be heard, whether one's conditions be exalted or lowly, is a right the courts have a duty to vindicate. It was to vindicate that right, and to get at the truth about the conditions of some of the lowliest offscourings of our society, that I helped bring *Ruiz v. Estelle* to birth.


Texas

The Ruiz Complaint and Trial (1972–1980)

The Arkansas litigation was the first and, in many ways, the most significant of all the prison cases, but the largest, longest, and most acrimonious involved the Texas prison system. The events that triggered it occurred in 1965, shortly after Frances Jallet decided to return to law practice after having raised a family. After spending a year at a University of Pennsylvania program to train legal services lawyers, she accepted a position in a federally funded legal services office in Austin, Texas. Almost immediately, she was drawn to some of the office’s work involving the legal problems of state prisoners. A few months later, she filed a petition on behalf of a writ writer in the Texas prison system who claimed he was being denied access to legal services.

As if acting on a premonition, officials of the Texas Department of Corrections (TDC) fiercely resisted Jallet’s efforts at every turn. They prevented her from visiting the prison on the grounds that she was not a criminal defense attorney representing inmates on appeal. They retaliated against the writ writers who tried to contact her. Eventually, they filed a rather unique suit against Jallet herself, seeking to bar her permanently from access to the prisoners on the grounds that she was “indoctrinating them with revolutionary ideas.” As anyone with an even vaguely Cro-Magnon sensibility might have guessed, this bit of legal creativity by the TDC not only failed to intimidate Jallet, but spurred her, and others, to further action. By the time TDC’s suit was finally and decisively rejected by the Fifth Circuit, Jallet had been joined by a number of colleagues who were busily filing dozens of petitions against the Texas prison system, challenging the lack of access to legal services and the harsh treatment of inmate writ writers. The writ writers, in turn, were beginning to file complaints about their conditions of confinement, the computation of good time, the prison disciplinary procedures, and a host of other issues.

These petitions were accumulating in disconcerting numbers by the early 1970s. Many of them were directed to Judge William Wayne Justice of the United States District Court for the Eastern District of Texas, who sat in Tyler, home of two state prison units.* Appointed to the district court by Lyndon Johnson in 1968, Judge Justice had quickly gained a reputation as an activist. By the time he began to address conditions in the state prisons, he had already handed down landmark rulings involving bilingual education, voter and employment discrimination, desegregation of schools and public housing, and conditions in custodial facilities for juveniles, the accused, and the mentally retarded.\(^5\) Prison reform was thus a natural extension of his abiding concern with the rights of legally marginalized individuals.

In 1972, because of this interest and involvement, Judge Justice was invited to speak at a Practicing Law Institute Seminar on prisoners’ rights at Dallas’s Southern Methodist University. At the seminar, a young San Francisco lawyer named William Turner gave an impassioned speech on the same topic. Turner, a native Texan and a graduate of Harvard Law School, had litigated desegregation cases in the South for the NAACP Legal Defense Fund. Impressed, Judge Justice resolved to develop a prisoners’ rights case of his own and to contact Turner to see if he would represent the complainants. As he later recalled, “I decided that I’d have a little test case to see what a first-class lawyer could do with the state’s contentions and what he could develop in favor of the inmates, because I wanted to find out if there was any substance to what [the prisoners] were saying.” To develop the issues in the case, Judge Justice asked his clerks to locate “typical” petitions for each type of complaint. Of the several such petitions they directed to him, one had been filed by David Ruiz on June 29, 1972. Ruiz, serving a twenty-five-year term for armed robbery, was known as a troublemaker by prison authorities because of his efforts in helping a number of other inmates file petitions in federal court. In his handwritten petition to Judge Justice, Ruiz alleged that he was being harassed by prison officials and was being denied his constitutional right to medical services and access to the courts. His petition was one of seven that Judge Justice ultimately selected for his “little test case.”

Judge Justice’s office tracked Turner down in Nepal, where, in true 1970s style, he was trekking, and invited him to handle the case. Upon his return Turner met with the judge, reviewed the petitions, and agreed. On April 12, 1974, he filed a revised version of Ruiz’s complaint, now consolidated with the complaints of several other inmates and titled Ruiz v. Estelle. The resulting case quickly escalated into a class action suit on behalf of every Texas prisoner against every Texas prison. This was unique at the time, and remains unique to this day; no other system of this magnitude has been the subject of a comprehensive prison conditions suit.* Other prison cases have either involved much smaller systems, like Arkansas’s or Rhode Island’s; single institutions, like the Colorado Pententuary and the Santa Clara County Jail; or particular practices in larger systems, like the California visitation rules. But Texas, which so often prides itself

* In 1974, Texas had the largest prison system in the nation in terms of inmate population. At present, California’s growing enthusiasm for incarceration has dropped Texas into second place.

* Texas, which has its own names for so many things, calls its prisons “units.”
on having things that are large, was now embarked on a longhorn-sized litigation involving a host of conditions in all twenty-four of its “units.” Judge Justice quickly recognized the need for rather extensive investigatory resources, far beyond the limited capacities of a legal services office. Displaying a willingness to improvise that was to continue for the duration of the case, and determination that was born from prior experience in massive class action cases involving school desegregation, he took the unusual step of ordering the U.S. Department of Justice to appear as amicus curiae for the plaintiffs. He also ordered it to use its substantial investigatory powers and resources “to investigate fully the facts alleged in the prisoners’ complaints, to participate in such civil action with the full rights of a party thereto, and to advise this court at all stages of the proceedings as to any action deemed appropriate.” The department’s Office of Civil Rights was already involved in a suit challenging racial discrimination in the Texas prisons, and was thus familiar with the situation. Still staffed by lawyers recruited in the heyday of its civil rights activity, the Justice Department attorneys welcomed the request and enthusiastically joined the litigation. Attorney Gail Littlefield was named cocounsel along with Turner, and the department’s resources were deployed to investigate conditions in the Texas prisons. Like dozens of other innovative rulings that Judge Justice would make in Rued, the decision to draw the U.S. Department of Justice into the suit was appealed by the state to the Fifth Circuit Court of Appeals; like almost all the others, the decision was upheld.

As the pretrial proceedings got under way, another distinctive aspect of the Texas litigation quickly became apparent. Arkansas prison officials had recognized that they were part of a backward, corrupt, mismanaged system in an impoverished little state, and were consequently apologetic about the practices revealed by the litigation against them. Other southern prison officials, while they varied in their levels of voluntary self-abnegation, generally displayed similar reactions. But Texas and the TDC were different. Texas was a large, wealthy, and rapidly growing state, located at the geographic juncture where the South became the Sunbelt. And Texas prisons were regarded by their own officials—and by many outsiders—as not only well managed, but as paragons of stern, effective punishment.

This belief in the exemplary nature of the Texas prison system had been carefully cultivated during the previous twenty-five years. It began with the appointment of Oscar Ellis as the commissioner of the Texas Department of Corrections in 1947, a reaction to the usual southern-state scandals over corruption and abuse. Ellis began his adult life as a shoe salesman in Memphis and had backed into corrections. Elected to the Shelby County Board of Commissioners in the late 1930s, he was assigned responsibility for overseeing maintenance of the county roads. This required coordination with the county Department of Corrections, whose inmates worked on the road gangs. Ellis found that he had a gift for disciplining and controlling prisoners, and in short order was running the county corrections work program. His model of a highly regimented, self-sufficient correctional system attracted general notice, and a few years later he was called to apply his approach in Texas. As the state’s first systemwide prison manager, he was supposed to clean up the mess, and to a considerable extent he did. For the next fourteen years, until his death in 1961, Ellis reigned over the Texas prisons with an iron hand. He gained widespread respect within the state because he was an efficient administrator who ran orderly institutions and made few demands on the state budget. The prisoners were marched into the fields six days a week where they worked from “day clean to first dark” growing cotton and a variety of other crops on the more than 100,000 acres of agricultural land owned by the TDC. They were guarded largely by “building tenders,” armed inmate trustees who were compensated with a variety of costless goods such as special privileges and the opportunity to abuse the other inmates. If they failed to work, or failed to work hard, or sometimes failed to work ferociously hard, they were beaten with a rawhide strap. They were fed cheap food, housed in substandard facilities, and denied all but the most rudimentary medical care. Between the late 1940s and 1958, the average daily cost of maintaining an inmate in the Texas prisons declined from $4 to less than $1.25, and in some years the system even returned funds to the state. This was greatly appreciated by the state legislature, and was no doubt one of the reasons legislators were so willing to defer to Ellis and to abstain from “meddling” in TDC affairs.

Ellis’s successor, George Beto, formerly president of a Lutheran college in Austin, not only maintained this tradition, but elevated it to near mythology. Fully six foot, seven inches tall, Beto was a man of tremendous charm and energy, known with fearful admiration by staff and inmates alike, as “walking George” for his unannounced, personal inspections of the prisons under his command. During his nearly twelve years in office, from 1961 until his retirement in 1972, the TDC came to be regarded as a model prison system: efficient, orderly, and inexpensive. This view was widely held throughout the United States, as evidenced by Beto’s election in 1970 as president of the American Correctional Association. In 1972, just as the Rued case got under way, he was succeeded by James Estelle, his former assistant and handpicked successor.

Although the litigation ultimately revealed the Texas prisons as something of a Potemkin village, the initial reaction of TDC officials to the prisoner complaints must be understood in light of this twenty-five-year myth that had been painstakingly fostered by two powerful, charismatic, and morally self-assured commissioners. TDC officials were proud of their
traditions, viewed their authoritarian regime with its insistence upon cleanliness, order, and strict discipline as the epitome of penological success, and resented outside interference. The bizarre lawsuit under Beto’s leadership against Frances Jalet, on the grounds that she was a “troublemaker” intent on “indoctrinating [prisoners] with revolutionary ideas,” was not an aberration, but a product of this self-righteous mentality.

The TDC’s position in the Ruíz litigation, therefore, was predictably one of fierce, no-holds-barred resistance. Because Estelle lacked the charisma and creativity of his predecessors, as Beto himself acknowledged to one of the authors, he felt all the more determined to maintain the regime they had established. He categorically denied any wrongdoing by the TDC, denied that “building tenders” did anything other than janitorial work, and continued to resist and protest at each step of the case. In fact, during the lengthy pretrial phase between 1975 and 1977, Judge Justice had to issue a number of orders to protect the safety of inmates who were cooperating with the plaintiff’s attorneys.

The trial finally began in Houston on October 2, 1978, and its massive scale reveals the intensity of the conflict between the plaintiffs and the TDC. The trial lasted 195 days, as the court heard 349 witnesses and reviewed 1,565 exhibits. This mother of all prison trials concluded nearly a year later on September 20, 1979. Fourteen months later, on December 12, 1980, Judge Justice issued a 118-page opinion that amounted to a wholesale condemnation of the Texas prison system. In his conclusion, he could hardly contain his anger at what he had found and his contempt for the officials who had categorically denied these facts:

It is impossible for a written opinion to convey the pernicious conditions and the pain and degradation which ordinary inmates suffer within the TDC units—the gruesome experiences of youthful first offenders forcibly raped; the cruel and justifiable fears of inmates, wondering when they will be called upon to defend the next violent assault; the sheer misery, the discomfort, the wholesale loss of privacy for prisoners housed with one, two or three others in a forty-five-foot cell or suffocatingly packed together in a crowded dormitory; the physical suffering and wretched psychological stress which must be endured by those sick or injured who cannot obtain adequate medical care; the sense of abject helplessness felt by inmates arbitrarily sent to solitary confinement or administrative segregation without proper opportunity to defend themselves or to argue their causes; the bitter frustration of inmates prevented from petitioning the courts and other governmental authorities for relief from perceived injustices.

Judge Justice held that TDC was in violation of the Constitution in six areas: space per inmate, security and supervision, health care, disciplinary procedures, access to legal services, and sanitation and safety conditions. He also indicated a strong preference for the parties to negotiate a settlement rather than relying on the court to formulate its own remedial order. The plaintiffs’ attorneys were quite willing to do so, but the TDC officials were seething with rage. While they acknowledged that health services, disciplinary procedures, access to legal services, and sanitation conditions were less than optimal, they argued that these services met constitutional minimums. They thus felt that the judge was holding them to unreasonably high standards and did not fully appreciate the need for security and control. And throughout the trial TDC officials had steadfastly denied plaintiff’s allegations that inmate building tenders—the TDC’s own name for trusts—were used for security and supervision of other inmates. Nothing in Judge Justice’s ruling caused them to change their stance. Although TDC and state officials were bitter that Judge Justice had given them virtually no credit for doing anything right, it was this condemnation of the building tender system that made them truly apoplectic.

Nevertheless, the TDC officials finally did agree to negotiate, believing that they were probably better off participating in the formulation of a consent decree than relying on Judge Justice to formulate one on his own. For them, in other words, negotiations were simply the lesser of two evils. After three months of arm-twisting, Judge Justice finally got the parties to agree to a brief document outlining a procedure for correcting most of the violations found by the court. It contained a list of improvements that had been made since the trial in the areas of health care, provisons for special-needs prisoners (retarded, physically handicapped, developmentally disabled, or mentally ill), work safety and hygiene, the use of chemical agents, the terms and conditions of solitary confinement, and the terms and conditions in administrative segregation. It also specified that the TDC would prepare additional plans to address problems in these areas in light of “the relevant facts and conclusions contained in the court’s Memorandum Opinion of December 12, 1980.” In all likelihood, this agreement could only have been reached because it was brief and couched in very general language, a tactic that, while successful in the short run, guaranteed that the intense conflict that had characterized the trial would subsequently reemerge.

The Consent Decree, the Special Master, and the Building Tenders (1981–1983)

The draft settlement agreement was submitted to Judge Justice in spring of 1981 and received his swift approval. Judge Justice also persuaded the parties to agree to the appointment of a special master to monitor the preparation and implementation of the plans. A few months later, on July 21, 1981, after reviewing nominations submitted by the parties, he selected Vincent Nathan. Nathan had once taught contracts at the University of
Toledo School of Law. In 1974 District Judge Timothy Hogan had appointed Nathan, who then had had no experience or special interest in prisons, as the master in *Rhodes v. Chapman*. Although the resulting decision was ultimately reversed by the Supreme Court, as noted in Chapter 2, Nathan's intelligence and natural courage had gained him respect from the attorneys for both sides in the case. After his work on *Rhodes*, he was appointed in several other cases, and by the end of the decade he was, along with Allen Bred, one of the two best known masters in the field. He was widely regarded as knowledgeable, businesslike, and well organized, but even his admirers described him as arrogant.

Justice's order gave Nathan sweeping powers and, rather unusually, granted him authority to appoint several assistants. Although the order emphasized that he could not "intervene in the administrative management of the Texas Department of Corrections," or "direct the defendants or any of their subordinates to take or to refrain from taking any specific action to achieve compliance," it provided that Nathan and his assistants could observe, monitor, find facts, report or testify as to his findings, and make recommendations to the court concerning steps which should be taken to achieve compliance. The special master may and should assist the defendants in every possible way, and to this end he may and should confer informally with the defendants and their subordinates on matters affecting compliance.

The Court also granted the special master access to TDC files and the authority to conduct confidential interviews with staff and inmates, to attend all formal meetings of TDC officials, to require written reports from any TDC staff member, and to "order and conduct hearings with respect to the defendants' compliance with this court's orders."

Although TDC officials had been consulted regarding the idea of appointing a special master, and welcomed the appointment of Nathan because of his known expertise in corrections, the sweeping powers he received were viewed as one more gratuitous insult by Judge Justice. And almost immediately after Nathan commenced his work, TDC officials realized that they had made a mistake by not opposing his appointment.

To assess the adequacy of the TDC plans, Nathan and his associates held hearings and conducted their own investigations. In doing so they almost invariably found the TDC's plans to achieve compliance with the consent decree to be woefully deficient. TDC officials typically acknowledged minor violations, but Nathan's investigations revealed major ones. The TDC proposed modest, incremental reforms; Nathan saw the need for sweeping change. When such disagreements occurred, as regularly they did, the special master would ask the TDC to revise its plans in light of his findings and offer "suggestions" about what would be required to make the new plans satisfactory. This pattern occurred so frequently that the sequence—submission of plans followed by the master's review and then revision and resubmission—became confused and perhaps even reversed. Nathan gradually came to be perceived as directing the scope and substance of the TDC's plans, rather than simply responding to them.

From Nathan's perspective it was the recalcitrance of the defendants that forced him and his staff to become increasingly involved in ferreting out issues and problems, and in determining the concrete steps needed to meet the requirements of the consent decree. From the defendants' perspective, Nathan was reveling in his power to "run the institution," and nothing they did could ever satisfy him. The final authority to resolve the ensuing disputes belonged to Judge Justice, and he almost always exercised it in favor of his special master. Throughout the process, TDC officials continued to challenge Nathan's findings and requests for more comprehensive planning, but Justice invariably supported Nathan and chastised the TDC for its recalcitrance. Indeed, as TDC resistance to the court continued, Justice's confidence in the special master seemed to grow, and the size and resolve of the master's office grew apace. At its apogee, the office had three monitors, a staff of thirteen, and an annual budget of well over one million dollars. It also had the collective determination to compel the TDC to abide by both the letter and the spirit of the consent decree, by persuasion if possible but by force if necessary.

As a result, Nathan was able to pry out of the TDC a series of increasingly detailed plans which covered virtually every facet of prison life, including delivery of health services, inmate access to law libraries, vocational training programs, space requirements, diets, heating and ventilation, inmate classification systems, plans to deal with inmate gangs, correctional officer hiring, promotion policies, early release options, and architectural plans for new construction in the face of the mushrooming prison population. Each of the plans, together with the special master's reports on them, could run into the hundreds or even thousands of pages, and involve extraordinary levels of detail. Many of the recommended actions depended on vast funding increases for hiring and training new correctional officers, renovating large, old facilities, building still larger new ones, and expanding health, education, and other services. The court routinely approved these recommendations and ordered TDC officials to comply with them. The not-so-hidden audience for many of these recommendations and court orders was the governor and state legislature. The master's findings and recommendations emboldened plaintiffs' attorneys, who continued to expand their inquiry and to unearth new issues. For a period, it seemed, the more TDC acted to respond to these criti-
isms, the more additional problems were revealed and the more the court’s concerns expanded.

The most divisive issue in the entire process, and the one that best reveals the deep hostility between plaintiffs and defendants, involved the building tenders. At trial the plaintiffs’ attorney Bill Turner had alleged that the building tender system, which placed prisoners under the discretionary control of other prisoners, had subjected them to a regime of “totalitarian brutality.” The judge agreed, and the issue had been included in his consent decree, although the nature of the defendant’s response had not been specified. Because the TDC continued to deny the very existence of the building tender system, one of the first things Vincent Nathan did after receiving his appointment was to assign his monitor, David Arnold, to conduct an investigation into the plaintiffs’ allegations. Within short order, Arnold produced a lengthy report documenting the building tenders’ role in guarding prisoners and maintaining general security. Even after this report, TDC officials continued to deny the findings, and successfully enlisted then Attorney General Mark White to their cause, who at the time was preparing an appeal of Judge Justice’s rulings on behalf of the TDC. White had gubernatorial ambitions, which were shortly to be realized, and he and then Governor William Clements were seeking to outdo each other in their support for the TDC and their condemnation of Judge Justice’s meddlesome orders.

At this juncture, however, a dramatic turning point occurred in the Texas prisons case. One of the TDC lawyers who was coordinating the appeal was Steve Martin. For many years prior to going to law school, Martin had worked as a guard in Texas prisons, and he was intimately familiar with their procedures, including the actual operation of the building tender system. As he recounts in his coauthored book about the case, he initiated his own quiet investigations in the wake of Arnold’s report, the TDC’s denials, and the attorney general’s plans for the appeal. Drawing on his extensive contacts among both inmates and guards, Martin learned that the system was still intact and that, if anything, Arnold, as an outsider, had been unable to uncover many of its most egregious features. There followed a series of meetings with the attorney general’s office, and with the Houston law firm of Fulbright and Jaworski, which had been retained to assist with the appeal, and later to assist the attorney general himself. Martin quietly informed them that Arnold’s report was essentially accurate; if anything, it had understated the problem. Attorney General White and his staff were incredulous at first and continued to rail against Judge Justice, but Martin’s actions did sow the initial seeds of doubt. The first member of the defense team to seize upon Martin’s evidence, however, was not one of the TDC’s fancy lawyers, or the Texas attorney general, but Dick Whittington, a member of the Texas Board of Corrections.

Until Ruiz forced the TDC into the limelight, the board had been an inactive oversight body, rubber-stamping whatever actions the commissioners proposed. Now it was beginning to take an active role in trying to protect the TDC from the court’s ever escalating attacks. As the only lawyer on the board, Whittington, a conservative Republican, had been charged with keeping abreast of the litigation, and thus learned about Martin’s confirmation of Arnold’s findings. At a meeting with Fulbright and Jaworski lawyers and TDC officials, he confronted Commissioner Estelle. Within a few days, Attorney General White was asking tough questions of Estelle and the TDC, angry that he had been lied to, and no doubt angrier still that he had embraced the lie in public. As time went on, the extent of the TDC’s prevarications became increasingly apparent; with surprising rapidity, state officials began to place more credence in the court’s findings and were motivated to conduct their own investigations, which in turn uncovered still other problems and abuses.

As these events were transpiring, the TDC suffered another serious defeat—the loss of its appeal from Judge Justice’s order. Even as the parties were hammering out the provisions of the settlement agreement and taking the first steps toward its implementation, state officials had been preparing to mount a full-scale appeal of the court’s ruling, challenging the court’s findings and the scope of the special master’s authority. The appeal grew with the case, as the TDC added challenges to the detailed changes that the court demanded. In December 1982, the Circuit Court of Appeals for the Fifth Circuit handed down a unanimous opinion upholding Judge Justice’s sweeping rulings, and the broad powers he had granted to the special master. The TDC had drawn heavily on its vast reservoir of political support among Texas lawmakers in mounting this appeal and the concomitant effort to discredit Judge Justice, the special master, and the lead plaintiff’s attorney. It had trifled with that support by lying about the building tender system, apparently hoping that Judge Justice would be reversed and the TDC could withdraw into its prior insularity and independence. Now the appeal was lost, the lie exposed, and their political support was crumbling.


By the mid-1980s, it seemed clear that the old order was passing, although battles continued to be fought and resistance remained fierce. The central features of the system under which it had flourished—income-producing prison labor, the building tenders, paternalistic discretionary control—had all been ground into the Texas dust. Ruiz had not found any of these features unconstitutional per se, but the joint implementation efforts of Judge Justice and Vincent Nathan created a regime in which they could
not survive. Instead of profit-making labor, Justice and Nathan demanded vocational programs and vastly increased expenditures on food and health care; instead of the inexpensive, sadistic convict building tenders, they demanded well-trained, salaried guards; instead of paternalism, they demanded due process and formally enacted legislation. These changes were each extensive by themselves; collectively, they produced a complete transformation of the methodology and style of the Texas prisons.

The collapse of the old order created a crisis within the TDC, as many of the most experienced managers were forced to resign or chose to do so. Those disillusioned few who remained were compelled to oversee the work of a rapidly growing cadre of inexperienced and hastily recruited guards who filled the role once occupied by the building tenders. With the court, its special master, and increasingly disgruntled state officials scrutinizing them, the TDC’s leaders initiated a series of administrative shake-ups, which resulted in still more resignations, dismissals, and reassignments, plus a regime of micromanagement from the top down that further undermined staff effectiveness and morale. During 1983 and 1984, over two hundred disciplinary actions were brought against the remaining correctional officers. Citing frustration with the court and an inability to obtain funding from the state legislature, James Estelle resigned in 1983.68 He was replaced in May 1984 by Ray Procuin, the first TDC director who accepted the court orders as a given and was prepared to work within the framework established by them. Procuin had a solid record as a tough, reform-minded correctional administrator, whose strength was turning problems around quickly. He had held a series of important positions in California and, at the time of his appointment, was deputy director of corrections in New Mexico, specifically appointed there to bring order and discipline to that state’s prison system in the wake of the 1980 rioting that had left thirty-three inmates dead. In Texas Procuin only served a little more than one year, but during that time he agreed to a second major settlement of outstanding issues that included crowding, visitation, staffing, construction, and classification. In reaching these agreements, Procuin alienated Attorney General White, who had continued to use the prison litigation as a campaign issue and had attacked any proposals, including his own earlier ones, to spend more funds on prisons. Rather than waiting to be fired by soon-to-be Governor White, Procuin resigned.

This administrative and political turmoil had its counterpart among the inmates. The problem had been anticipated by both Judge Justice and various state officials, but they were unable to prevent it. Guarded by an inexperienced and ill-prepared staff and freed from the brutal repression of the building tenders, inmates began to prey on each other with increasing frequency, while inmate gangs battled each other through every section of the Texas prisons. These gangs were part of a nationwide development unrelated to events in Texas, or even prison reform generally, but in Texas they had clearly seized an opportunity presented by the laca

cun in control. As Ben Crouch and James Marquart observe in their study of Texas prisons in the aftermath of Ruiz, to “protect themselves in an increasingly uncertain world, many inmates resorted to violent self-help, and in the process violence became a mechanism of social control.”64 The net result was that inmate-to-inmate violence escalated to an all-time high. The number of recorded fights among prisoners more than doubled, from thirty-eight per thousand prisoners in 1983 to eighty-seven per thousand in 1986. Inmate deaths caused by other inmates skyrocketed, jumping from one or two per year throughout the 1970s to twenty-five in 1984 and twenty-seven in 1985.65

Following Procuin’s resignation, state officials turned to another non-Texan to run the TDC: Lane McCotter. McCotter had been both a career soldier and a career corrections administrator, having spent his entire time in the Army – over twenty years – running military prisons. His last posting had been commander of the military barracks at Fort Leavenworth, Kansas, the toughest of the Army’s several maximum security facilities. Among his colleagues McCotter was known as someone who was firm, fair, and ran a tight operation for both his staff and inmates. The significance of his selection could not have been lost on either the TDC administrators and correctional officers or the inmates – everyone knew that he had been selected to restore order and discipline to both these now unsettled groups. McCotter moved quickly, adopting the strict style that had characterized his administration at Leavenworth. He instituted frequent twenty-four-hour lockdowns and introduced massive numbers of new guards who had been subjected to an intense regimen of training. By 1986, the level of inmate violence began to decline. Indeed, Crouch and Marquart report that after McCotter’s changes, long-term inmates felt safer than ever before, not only in comparison with the immediately previous period of heightened violence, but in comparison to life under the old order and the building tender system.66

This new regime was also harsh, however. Crouch and Marquart characterize it as “hyperlegalistic,” by which they mean that the new director insisted that every detail in the prison’s operations had to run “by the book,” a book that he himself had written.67 At times, some observers have commented, this meant that compliance with picayune, hastily conceived rules took precedence over common sense. But it did produce immediate results, and it eventually began to mature into a new order modeled along military lines rather than upon autocratic and personalistic rule.

Although everyone recognized the need to restore order, other features
of the court-ordered changes faced fierce resistance and daunting complications, as TDC officials continued to be recalcitrant and uncooperative. Writing of his experience as a monitor for the special master, Samuel Brackel described the difficulties in implementing the seemingly straightforward task of providing prisoners access to legal materials:

'The very introduction of the access [to legal materials] rules into the prison system generated—like any other new set of rights or rules—considerable conflict and controversy. Inevitably, the availability of these new rights led to a spirited assertion of them by inmates and an explosion of charges that they were being violated by prison staff. The staff in turn reacted to these charges, often in a fashion that matched the unproductive and frivolous character of too many of the inmate complaints.'

This problem was complicated still further when the new library, with its relatively easy access, became a convenient rendezvous for homosexual liaisons, which at times crowded the limited space beyond capacity and initiated yet another round of conflict among inmates, staff, the prison system, and the Court.* Such spiraling problems were repeated hundreds of times, each time a new program or a new policy was put in place.

The situation was further complicated by the emergence of an additional problem that was clearly not attributable to either the TDC or the court order—the prison population explosion. Between 1972, when the case was first filed, and 1982, when the trial ended, Texas’s prison population jumped from fifteen thousand to over twenty-six thousand. By the time the court terminated jurisdiction over Ruis, in December 1992, it had risen to nearly fifty thousand. As in Arkansas, what began as a suit challenging practices and conditions eventually turned into a crowding suit, with the court, along with plaintiffs’ attorneys and the defendants, scrambling to devise ways to accommodate the hundreds of new inmates who arrived each day at the doors of the state’s already overcrowded prisons.

During the course of the litigation, this pressure grew even more acute as a result of separate federal court orders dealing with crowding in Texas county jails. For instance, in a suit against the Harris County (Houston) jail, a different federal judge ordered the TDC to stop its practice of refusing to accept newly sentenced offenders and leaving them to languish in the still more crowded county jails. Although this was a strategy devised by the TDC to meet its own court-ordered population caps, its compliance

* This pattern ultimately led Brackel to question the value of highly intrusive court orders. Repeatedly, he argues, such changes ‘led to a situation in which the level of mutual psychological harassment and the inclination to engage in other petty tests of power [were] raised to new heights.’

was purchased at the price of keeping inmates in even worse conditions. The Harris County jail suit precipitated a crisis regarding this arrangement, but despite sustained litigation, the matter was never fully resolved and as of this writing TDC officials still try to delay acceptance of offenders sentenced to their custody.

The court’s response to the crowding problem was to obtain the parties’ agreement to a separate stipulation. In its original version, established in 1985, this stipulation provided for a system capacity of 40,134, but it was regularly amended as new facilities opened, and had reached 77,213 by 1995. The TDC’s response to crowding took a variety of forms. Nudged by the court, it entered into a massive building campaign, greatly expanding its housing capacity throughout the 1980s. It turned to private contractors who quickly built and began to run facilities for low-security offenders. It developed a classification system that allowed it to house offenders more efficiently. It delayed acceptance of newly sentenced offenders, the court orders notwithstanding, thereby decreasing intake. It constructed tent cities within the walls of existing facilities to house inmates temporarily. Throughout all this, there was constant friction with the plaintiffs, the special master, and the court, as the population of various facilities approached the numbers provided for in a crowding stipulation.* But there was also a sense that all parties were addressing the same problem, and that they perceived that problem in roughly equivalent ways.

In fact, by the late 1980s, there was a new attitude toward the court in evidence among TDC officials, largely because the officials themselves were new. These new officials grudgingly accepted the court’s jurisdiction and embraced the views of modern correctional professionals. They no longer sought to defend the old order, or saw a need to lie about the discredited building tender system. It may have been this change in attitude, more than anything else, that led Judge Justice to begin winding down this elephantine case. On March 6, 1990, Justice ordered the parties to begin negotiations for a comprehensive final order. He required that the parties address “compliance problems, ensure that unconstitutional conditions do not recur, eliminate unnecessary detail, institutionalize reforms, improve defendant’s internal monitoring mechanisms, and establish remedies and timetables for termination of the court’s jurisdiction.”

* Early in this process, after Judge Justice had released inmates on his own in order to relieve crowding, the legislature in Texas enacted the Texas Prison Management Act in order to permit the TDC to select the inmates to be released. This act, which provided a mechanism for early release whenever crowding reached a specified level (95 percent of capacity as defined in the act) was invoked twelve times in the first two years of its existence.
 Needless to say, the path toward this final order was not always smooth, and the negotiations took over two years to complete. The proposed final judgment that emerged was divided into twenty-two sections, each covering an issue that had been central to the litigation. Rather than establish a timetable for the complete termination of the court’s jurisdiction, the proposal included certain permanent injunctions that prescribed defendant’s future actions with regard to crowding and to selected services.*

On December 11, 1992, Judge Justice signed the final order. In it he observed that “Deputy Director Scott... testified that the dramatic increases in staffing since the court entered its Amended Decree in 1981 have permitted the TDC to replace the building tender system with uniformed security staff, ... and the record reflects that... officials effectively have dismantled the building tender system, and... that those officials intend to maintain their current policies in this area.” This was a dramatic turnabout from the first several years of the litigation, when TDC officials steadfastly denied the existence of the building tender system while trying to maintain it in actuality. Although the final judgment covered a host of issues, it may have been the significance of this acknowledgment and the changes that it implied that led Judge Justice to conclude his opinion with the following observation:

Over twenty years ago, a handful of brave prisoners set in motion a process that even defendant’s highest officials acknowledge has improved all aspects of the TDCJ-ID. TDCJ-ID has remade itself into a professionally operated agency whose goals are to achieve the highest standards of correctional excellence.

Equally important, the measures taken by TDCJ-ID officials to meet their constitutional obligations have been memorialized and institutionalized in numerous internal rules and regulations that have replaced this court’s orders as the agency’s “road map” to success. The court is satisfied that the defendants not only will maintain and implement these rules and regulations, but also will continue to strive to improve on them and their implementation despite the absence in many areas of detailed court orders.**

But even as he took great satisfaction in the department’s change of attitude and positive accomplishments, Judge Justice’s opinion sounded two themes he regarded as ominous. Noting that the department agreed to be permanently enjoined from exceeding population caps for those institutions identified in the plan, he nevertheless observed that the state appeared to have an “insatiable appetite” for incarcerating people. He also noted two recent, retrenchment-era cases, *Rufo v. Inmates of the Suffolk County Jail,* and *Freeman v. Pitts,* which were handed down by the Supreme Court as the proposed settlement agreement was being negotiated. In *Rufo* the Supreme Court had substantially weakened the importance of consent decrees, establishing a “flexible” standard for the modification of such decrees in place of the more restrictive “grievous wrong” standard that had been in effect since 1992, and that had applied to this case until its final months. Thus even as Judge Justice hailed the dramatic improvements in the state’s prisons and the professionalism of its new administrators, he noted two developments that threatened to unravel the complex, painfully achieved agreement that had brought *Ruiz* to its conclusion.

In the twenty years since David Ruiz filed his petition and, more particularly, the twelve years that the Texas prisons had been placed under comprehensive judicial supervision, massive changes had occurred. The patriarchal regime, the building tenders, and the primitive living conditions were gone; professional guards, medical personnel, educational programs, and a federally trained superintendent had appeared in their place. Hundreds of millions of dollars, perhaps as much as a billion, had been spent as a result of the court’s orders. In the largest, most bitterly contested prison case in American history, and almost certainly one of the largest and most bitterly contested legal cases in the history of Anglo-American law, the court had won a decisive, if potentially unstable victory.

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* Sections of the final order addressed the following issues: staffing, support services, disciplinary procedures, health and safety, use of force, access to courts, maintenance of facilities, heating and ventilation, programmatic and recreational opportunities, crowding, bilingual staff, internal monitoring by defendants as to the conditions of the final agreement, programs for mentally retarded inmates, health services, psychiatric services, and conditions on death row.
3. TWO CLASSIC PRISON REFORM CASES: ARKANSAS AND TEXAS


3. This description, like much of the information about the litigation's history on the Arkansas prisons, is based on interviews conducted by the author at Cummins Farm on January 2, 1992, with A.L. Lockhart, commissioner of the Arkansas Department of Corrections, and with other Arkansas prison officials. For a description of Mississippi's Parchman Farm, another rather similar institution, see David Oshinsky, *Worse Than Slavery*, 19 (1996).


6. Id. at 684.

7. 268 F. Supp. 804, 806 (E.D. Ark. 1967); vacated 404 F.2d 571 (8th Cir. 1968).


9. Id.

10. 400 F.2d 1185 (8th Cir. 1969).

11. Authors' interview with Judge Eisele, Little Rock, Arkansas, January 2, 1992. (Judge Eisele was Rockefeller's campaign manager in his first attempt for the governorship, and later his chief of staff.)

12. For a general description, see Mary Parker, "Judicial Intervention on Correctional Institutions: The Arkansas Odyssey" (Ph.D. dissertation, Houston State University, 1983).


15. See Parker, *supra* note 12; authors' interview with Mary Parker, Little Rock, January 3, 1992.

16. 300 F. Supp. at 832.


23. The figures in the footnote are found at id. at 373.

24. Id. at 381.
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63. Id. at 15–23.
64. Id. at 9–25; Crouch & Marquart, supra note 61, at 13–46.
65. Crouch & Marquart, supra note 61, at 35.
66. Id. at 40.
67. Id. at 42–43.
68. Id. at 43.
69. Author’s interview with George Beto, Huntsville, Texas, May 9, 1986.
70. Martin and Ekland-Olson, supra note 61, at 175–77.
72. Id. at 1381.
73. Martin and Ekland-Olson, supra note 61, at 176–77.
75. Crouch & Marquart, supra note 61, at 127; Martin & Ekland-Olson, supra note 61, at 183.
78. Author’s interview with O. L. McCotter, Huntsville, Texas, May 9, 1986.
79. Beto interview, supra note 69.
80. Martin & Ekland-Olson, supra note 61, at 198.
81. Id. at 189. Id. at 196.
83. Crouch & Marquart, supra note 61, at 235.
84. Crouch & Marquart, supra note 61, at 199.
85. Id. at 201.
86. Id. at 221.
87. Crouch & Marquart, supra note 61, at 149. See also McCotter interview, supra note 78.
91. Id. at 33.

4. THREE VARIATIONS ON THE THEME: COLORADO STATE PENITENTIARY, THE SANTA CLARA COUNTY JAILS, AND MARION PENITENTIARY

Colo. Rev. Stat. § 17-24-102(1) (a), (b), (c), (d) (1978).
Id. at 124.
Id. at 142.
Id. at 137, 140.
Id. at 46.
Id. at 133.
Id. at 134.
Id. at 133.
Id. at 133.
Id. at 133.
Id. at 133.
Author’s interview with Brad Rockwell, Legal Affairs Coordinator, Colorado Department of Corrections, Canon City, Colorado, June 6, 1989.
Cited in Ramos v. Lamm 485 F. Supp. at 129.
Ramos v. Lamm 485 F. Supp. at 133.
Ramos v. Lamm, supra note 3.
Id. at 140.
Ramos v. Lamm, 485 F. Supp. at 144.
Id. at 156.
Id. at 170.
Id. at 168.
The language quoted in the footnote from the dissenting opinion appears at id. at 560.
Ramos v. Lamm, Civil Action 77-K-1093 (N. D. Colo., August 7, 1985, at 3 (consent order).
Ramos v. Lamm, Civil Action 77-K-1093 (N. D. Colo., March 27, 1986) (Memorandum opinion and order).
For a history and analysis of jail litigation, see Wayne Welch, Counties in Court: Jail Overcrowding and Court-Ordered Reform (1995).
By Mr. ABRAHAM (for himself, Mr. HATCH, Mr. SPECTER, Mr. Kyl, and Mrs. HUTCHISON):

S. 1275. A bill to provide for appropriate remedies for prison condition lawsuits, to discourage frivolous and abusive prison lawsuits, and for other purposes; to the Committee on the Judiciary.

THE PRISON CONDITIONS LITIGATION REFORM ACT

Mr. ABRAHAM. Mr. President, I introduce legislation that I believe is essential if we are to restore public confidence in government's ability to protect the public safety. Moreover, it will accomplish this purpose not by spending more taxpayer money but by saving it.

This legislation removes enormous obstacles the Federal Government has placed in the path of States' and localities' ability to protect their residents. I would like to highlight three of these obstacles and explain what we are going to do to remove them.

First, in many jurisdictions including my own State of Michigan, judicial orders entered under Federal law raise the costs of running prisons far beyond what is necessary. These orders also thereby undermine the legitimacy and punitive and deterrent effect of prison sentences.

Second, in other jurisdictions, judicial orders entered under Federal law actually result in the release of dangerous criminals from prisons.

Third, these orders are complemented by a veritable torrent of prisoner lawsuits. Although these suits are found non-meritorious the vast majority of the time (over 99 percent, for example, in the ninth circuit), they occupy an enormous amount of State and local time and resources; time and resources that would be better spent incarcerating more dangerous offenders.

Let me start with the problems in my own State of Michigan.

Under a series of judicial decrees resulting from Justice Department suits against the Michigan Department of Corrections, the Federal courts now monitor our State prisons to determine:

1. How warm the food is.
2. How bright the lights are.
3. Whether there are electrical outlets in each cell.
4. Whether windows are inspected and up to code.
5. Whether prisoners' hair is cut only by licensed barbers.
6. And whether air and water temperatures are comfortable.

Elsewhere, American citizens are put at risk every day by court decrees. I have in mind particularly decrees that ensure prison crowding by declaring that we must free dangerous criminals before they have served their time, or not incarcerate certain criminals at all because prisons are too crowded.

The most egregious example is the city of Philadelphia. For the past 8 years, a Federal judge has been overseeing what has become a program of wholesale releases of up to 600 criminal defendants per week to keep the prison population down at what she considers an appropriate level.

Under this order, there are no individualized bail hearings on a defendant's criminal history before deciding whether to release the defendant before trial. Instead, the only consideration is what the defendant is charged with the day of his or her arrest.

No matter what the defendant has done before, even, for example, if he or she was previously convicted of murder, if the charge giving rise to the arrest is a non-violent one the defendant may not be held pretrial. Moreover, the so-called non-violent crimes include stalking, carjacking, robbery with a baseball bat, burglary, drug dealing, vehicular homicide, manslaughter, terrorist threats, and gun charges.

As a result Philadelphia, which before the cap had about 18,000 outstanding bench warrants, now has almost 50,000. In reality, though, no one is out looking for these fugitives. Why look? If they were found, they would just be released back onto the streets under the prison cap.

In the meantime thousands of defendants who were out on the streets because of the cap have been reassigned for new crimes, including 79 murders, 959 robberies, 2,215 drug dealing charges, 701 burglaries, 2,748 thefts, 90 rapes, and 1,113 assaults.

Looking at the same material from another vantage point. In 1993 and 1994, over 27,000 new bench warrants for misdeemnor and felony charges were issued for defendants released under the cap. That's 63 percent of all new bench warrants in 1993 and 74 percent of all new bench warrants for the first 6 months of 1994.

Failure to appear rates for crimes covered by the cap are all around 70 percent, as opposed to, for example, non-covered crimes like aggravated assault, where the rate is just 3 percent. The Philadelphia fugitive rate for defendants charged with drug dealing is 76 percent, three times the national rate.

Over 100 persons in Philadelphia have been killed by criminals set free under the prison cap. Moreover, the citizenry has understandably lost confidence in the criminal justice system's ability to protect them. And the criminals, on the other hand, have every reason to believe that the system can't do anything about them.

All of this would be bad enough if it were the result of a court order to correct serious constitutional violations committed by the Philadelphia correctional system. But it is not.

Indeed, a different Federal judge recently found that conditions in Philadelphia's oldest and most decrepit facility—Holmesburg Prison—met constitutional standards.

These murderous early releases are the result of a consent decree entered into by the prior mayoral administration from which the current administration has been unable to extricate itself.

Finally, in addition to massive judicial interventions in State prison systems, we also have frivolous inmate litigation brought under Federal law; this litigation also ties up enormous resources. Thirty-three States have estimated that Federal inmate suits cost them at least $54.5 million annually. The National Association of Attorneys General have extraordinary number to conclude that nationwide the costs are at least $313.3 million. Since, according to their information, more than 95 percent of these suits are dismissed without the inmate receiving anything, the vast majority of the $313.3 million being spent is attributable to non-meritorious cases.

Mr. President, in my opinion this is all wrong. People deserve to keep their tax dollars or have them spent on programs they approve. They deserve better than to have their money spent, on keeping prisoners in conditions some Federal judge feels are desirable (although not required by any provision of the Constitution or any law). And they certainly don't need it spent on defending against frivolous prisoner lawsuits.

And convicted criminals, while they must be accorded their constitution rights, deserve to be punished. I think virtually everybody believes that while these people are in jail they should not be tortured, but they also should not have all the rights and privileges the rest of us enjoy, and that their lives should, on the whole, be describable by the old concept known as hard time.

The legislation I am introducing today will return sanity and State control to our prison systems. It will do so by limiting judicial remedies in prison cases and by limiting frivolous prisoner litigation.

First, we must curtail interference by the Federal courts themselves in the orderly administration of our prisons. This is not to say that we will have no court relief available for prisoner suits, only that we will try to retain it for cases where it is needed while curtailing its destructive use.
Most fundamentally, the proposed bill forbids courts from entering orders for prospective relief (such as regulating food temperatures) unless the order is necessary to correct violations of individual plaintiffs' Federal rights. It also requires that the relief be narrowly drawn and be the least intrusive means of protecting the federal rights. And it directs courts to give substantial weight to any adverse impact on public safety or the operation of the criminal justice system caused by the relief.

No longer will prison administration be turned over to Federal judges for the slightest reason. Instead, the State will be able to run prisons as they see fit unless there is a constitutional violation, in which case a narrowly tailored order to correct the violation may be entered.

The bill also will make it more difficult to release dangerous criminals back into the population, or to prevent the authorities from incarcerating them in the first place.

To accomplish this, the legislation forbids courts from entering release orders except under very limited circumstances. The court first must have entered an order for less intrusive relief, which must be shown to have failed to cure the violation of Federal rights. If a Federal court reaches this conclusion, it must refer the question of whether or not to issue a release order to a three judge district court.

This court must find by clear and convincing evidence that crowding is the primary means of violating the Federal right and that no other relief will remedy the violation of the Federal right. Then the court must find, by a preponderance of the evidence, that the crowding had deprived particular inmates of at least one essential, identifiable human need, and that prison officials have either deliberately subjected the plaintiffs to this deprivation or have been deliberately indifferent to it.

As important, this legislation provides that any prospective relief order may be terminated on the motion of either party 2 years after the later of the grant of relief or the enactment of the bill. The court shall grant the termination unless it finds that the original prerequisites for granting it are present at that time.

No longer, then, will we have consent decrees, such as those in Michigan under which judges control the prisons literally for decades. Finally, the bill contains several measures to reduce frivolous inmate litigation. The bill limits attorney's fees awards. In addition, prisoners no longer will be reimbursed for attorney's fees unless they prove an actual statutory violation.

No longer will courts award attorney's fees simply because the prison has changed pre-existing conditions. Only if those conditions violated a prisoner's rights will fees be awarded.

Prisoners who succeed in proving a statutory violation will be reimbursed only for fees directly and reasonably incurred in proving that violation.

In addition, attorney's fees must be proportionally related to the court-ordered relief. No longer will attorneys be allowed to charge massive amounts to the State for the service of correcting minimal violations.

And no longer will attorneys be allowed to charge very high fees for their time. The fee must be calculated at an hourly rate no higher than that set for court appointed counsel. And up to 25 percent of the net recovery awarded the court orders the plaintiff's wins will go toward payment of the prisoner's attorney's fees.

The bill also prohibits prisoners who have filed three frivolous or obviously nonmeritorious in forma pauperis civil actions from filing any more unless they are in imminent danger of severe bodily harm. Also, to keep prisoners from using lawsuits as an excuse to get out of jail for a time, prisoner release generally will be conducted by telephone, so that the prisoner stays in prison.

Mr. President, these reforms will decrease the number of frivolous claims filed by prisoners. They will decrease prisoners' incentives to file suits over how bright their lights are. At the same time, they will discourage judges from seeking to take control over our prison systems, and to micromanage them, right down to the brightness of their lights.

This is a far-reaching bill, Mr. President. One aimed at solving a complex, costly, and dangerous problem. Its several provisions will discourage frivolous lawsuits and promote State control over State prison systems. At the same time, this legislation will help protect convicted criminals' constitutional rights without releasing them to prey on an innocent public or keeping them in conditions so comfortable that they lose their deterrent effect.

I urge my colleagues to support this legislation.

I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

SEC. 1. SHORT TITLE.

This Act may be cited as the "Prison Conditions Litigation Reform Act".

SEC. 2. APPROPRIATE REMEDIES FOR PRISON CONDITIONS.

(a) IN GENERAL.—Section 3626 of title 18, United States Code, is amended to read as follows:

*§ 3626. Appropriate remedies with respect to prison conditions.

(1) REQUIREMENTS FOR RELIEF.—

(i) PROSPECTIVE RELIEF.—Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means of remedying the violation.

(ii) PRELIMINARY INJUNCTIVE RELIEF.—In any civil action with respect to prison conditions, a prisoner may obtain preliminary injunctive relief if the court finds that the preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the order final before the expiration of the 90-day period.

(2) PRISONER RELEASE ORDER.—(A) In any civil action with respect to prison conditions, no prisoner release order shall be entered unless—

(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (A) have been met.

(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered. The court shall enter a prisoner release order only if the court finds—

(i) by clear and convincing evidence—

(ii) that crowding is the primary cause of the violation of a Federal right; and

(iii) that any lesser relief will not remedy the violation of the Federal right; and

(E) The court shall enter a prisoner release order only if the court finds—

(i) by clear and convincing evidence—

(ii) that crowding is the primary cause of the violation of a Federal right; and

(iii) that any lesser relief will not remedy the violation of the Federal right; and

(F) Any State or local official or unit of government whose jurisdiction or function includes the prosecution or custody of persons who may be released from prison shall be entitled to intervene in any proceeding relating to such relief.

(2) TERMINATION OF RELIEF.—

(i) TERMINATION OF PROSPECTIVE RELIEF.—

(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief is terminable upon the motion of any party—

(B) 2 years after the date the court granted or approved the prospective relief; and

(C) 3 years after the date the court has entered an order denying termination of prospective relief under this paragraph; or
challenging the fact or duration of confinement in prison; 

(8) the term ‘prisoner’ means any person incarcerated or detained in any facility who is accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program; 

(9) the term ‘private relief’ means all relief other than monetary damages; and 

(10) the term ‘relief’ means all relief in any form that may be granted or approved by the court, and includes consent decrees and settlement agreements (except a settlement agreement the breach of which is not subject to any court enforcement other than the reinstatement of the civil proceeding that such agreement settled). 

SEC. 3. ADJUSTMENTS TO CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT. 

Section 7 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e) is amended by adding at the end the following new subsections: 

(1) ATTORNEY’S FEES—(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which the prisoner’s participation is required or permitted shall be conducted by telephone without removing the prisoner from the facility in which the prisoner is confined. Any State may adopt a similar requirement regarding hearings in such actions in that State’s courts. 

(2) As used in this subsection, the term ‘prisoner’ means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program. 

SEC. 4. SUCCESSIVE CLAIMS IN PROCEEDINGS IN FORMA PAUPERIS. 

Section 1915 of title 28, United States Code, as amended by adding at the end the following new subsection: 

(1) No award of attorney’s fees in an action described in paragraph (1) shall be based on the limitations on relief set forth in subsection (a).
§ 1997e. Suits by prisoners, 42 USCA § 1997e

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.

(c) Dismissal

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) Attorney's fees
§ 1997e. Suits by prisoners, 42 USCA § 1997e

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that--

   (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and

   (B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

   (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18 for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 of this title.

(e) Limitation on recovery

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(f) Hearings

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.
§ 1997e. Suits by prisoners, 42 USCA § 1997e

(g) Waiver of reply

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983 of this title or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) “Prisoner” defined

As used in this section, the term “prisoner” means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

Credits

Notes of Decisions (1095)

Footnotes
1 See Reference in Text note below.
42 U.S.C.A. § 1997e, 42 USCA § 1997e
Current through P.L. 113-9 (excluding P.L. 113-4) approved 5-1-13
CIVIL RIGHTS INJUNCTIONS OVER TIME: A CASE STUDY OF JAIL AND PRISON COURT ORDERS

MARGO SCHLANGER*

Lawyers obtained the first federal court orders governing prison and jail conditions in the 1960s. This and other types of civil rights injunctive practice flourished in the 1970s and early 1980s. But a conventional wisdom has developed that such institutional reform litigation peaked long ago and is now moribund. This Article's longitudinal account of jail and prison court-order litigation establishes that, to the contrary, correctional court-order litigation did not decline in the late 1980s and early 1990s. Rather, there was essential continuity from the early 1980s until 1996, when enactment of the Prison Litigation Reform Act (PLRA) reduced both the stock of old court orders and the flow of new court orders. Even today, ten years after passage of the PLRA, the civil rights injunction is more alive in the prison and jail setting than the conventional wisdom recognizes. Yet while the volume of court-order litigation had, prior to 1996, remained stable, the nature of court-order practice changed from a "kitchen sink" model to something much more precise. Where in the 1970s litigation tended to be broad in scope, with loose standards of causation and sweeping remedies, through the 1980s and 1990s litigation grew ever more resource-intensive, and addressed increasingly narrow topics with more rigorous proof and causation requirements. This Article argues that this change was caused not only by the increasing conservatism of the federal bench, but more interestingly by a generalized skepticism about issues of causation in law, the increased presence of large pro bono firms accustomed to a resource-intensive mode of litigation, and the salience of several extraordinarily extensive litigations as models.

* Copyright © 2006 by Margo Schlanger. Professor of Law, Washington University in St. Louis. Thanks for comments and ideas to participants in the 2004 Cornell Law School Junior Empirical Legal Scholars conference and in a Washington University in St. Louis faculty workshop, to Susan Appleton, Tomiko Brown-Nagin, Steve Burbank, Tracey George, Jim Jacobs, Laura Rosenbury, Peter Schuck, my colleagues of the Washington University Workshop on Empirical Research in Law (especially Andrew Martin and Kathie Barnes for statistics assistance), and, as always, to Sam Bagenstos.

I also want to thank the dozens of people who have shared their time and thoughts with me, some over several years, as I worked on the large project that includes this Article. The informants particularly helpful for this piece were: Elizabeth Alexander, Director, ACLU National Prison Project; John Boston, Director, Prisoners' Rights Project of the Legal Aid Society of New York; Alvin Bronstein, founder and former Director, ACLU National Prison Project; Donna Brorby, former plaintiffs' counsel, *Ruiz v. Estelle*; Steven Kelban, Director, Andrus Family Fund; Steve J. Martin, former general counsel, Texas Department of Corrections and frequent expert witness and court monitor in jail and prison cases; Vincent M. Nathan, frequent special master in jail and prison cases; and Don Specter, Director, Prison Law Office (San Quentin, Cal.). Many additional interviews, which have colored my views in significant ways, are listed in Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003).

All remaining errors are, of course, my responsibility.

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I

HISTORY AND COMMENTARY

A. Early History

The first prison and jail orders, in the 1960s, had some obvious links to broader trends in civil rights litigation—in particular to the desegregation litigation project spearheaded by the NAACP Legal Defense Fund. Not only were the lawyers (and the judges) often identical, the characteristic litigation techniques—complex party structure; relatively loose coupling of right and remedy; and forward looking and negotiated remedies, sometimes requiring an active and continuing role for the presiding judge—were the same. There were substantive links as well; the first cases required correctional facilities to implement behind bars legal rights generally applicable on the outside—free exercise of religion, equal protection of the laws, and free speech—the most important of which related to African American prisoners' subordination. The 1960s saw federal courts’

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22 Schlanger, Beyond the Hero Judge, supra note 7, at 2016–17.

23 For discussion of these features as the essential components of structural reform litigation, see, for example, Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1282-84 (1976).

24 The earliest court order of which I am aware was entered in Fullwood v. Clemmer, 206 F. Supp. 370, 374 (D.D.C. 1962), which required District of Columbia jail officials to allow Black Muslims to hold religious meetings. Desegregation orders followed almost immediately. See Bolden v. Pegelow, 329 F.2d 95, 96 (4th Cir. 1964) (requiring integration of District of Columbia’s Lorton Prison barber shops); Washington v. Lee, 263 F. Supp. 327, 333 (M.D. Ala. 1966) (desegregating penal and detention facilities in Alabama), aff’d, 390 U.S. 333 (1968) (per curiam); see also Cooper v. Pate, 378 U.S. 546 (1964) (per curiam), rev’d 324 F.2d 165, 167 (7th Cir. 1963) (holding that Black Muslim prisoner failed to state cause of action when he alleged discriminatory isolation and restrictions on possession of Koran). For a discussion of the connections between injunctive prison litigation and desegregation litigation, see Schlanger, Beyond the Hero Judge, supra note 7, at 2002–03; see also Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 95th Cong. 10 (1977) (statement of Assistant Att’y Gen. Drew S. Days, III) (“In the prison area the United States has participated in many cases in several States concerning conditions of confinement. This is partly as an outgrowth of litigation by the Attorney General under title III of the Civil Rights Act of 1964 to desegregate prison facilities.”); Telephone Interview with Stephen A. Whinston, former attorney, U.S. Dep’t of Justice (Jan. 20, 1999) (describing
newfound willingness to allow inmates the benefits of other rights, as well.\textsuperscript{25} It did not take long before a set of cases established rights to due process protections prior to imposition of prison discipline\textsuperscript{26} and to more humane conditions of in-prison punishment for disciplinary infractions.\textsuperscript{27} Soon thereafter, perhaps sensitized by the Attica riot and its aftermath\textsuperscript{28} to the deprivations that characterized prison life, courts began to grant ongoing relief in cases based on sometimes uncontested evidence of brutal and disgusting conditions not just in isolation cells but throughout facilities. The first case to require wholesale reform was in Arkansas in 1970.\textsuperscript{29}

The cases in the 1970s made up the first phase of this new kind of litigation. In those early days, even quite radical inmates' advocates (who might have been expected to prefer more political, less legal,
strategies) had extraordinarily high hopes for the cases. Litigation, and in particular overcrowding litigation, would further a decarceration strategy, some of them reasoned, in two ways. First, litigation would discredit imprisonment as an institution by highlighting the disconnect between the ideals of penal practice and their realities. Second, it would make incarceration both difficult and expensive. For example, David Rothman described some prison litigation proponents as “subscribe[ing] to a crisis strategy”:

They are convinced that implementing prisoners’ rights will upset the balance of power within the institutions, making prisons as we know them inoperable . . . . Since terror and arbitrariness are at the heart of the system, granting rights to prisoners is the best way to empty the institutions. And emptying the institutions, decarcerating the inmates, they say, should be the ultimate goal of reform.

Dr. Robert Cohen, a correctional physician who has been a court-appointed medical care monitor over many years, explained recently: “When all of us began our work, some of us felt that . . . by getting prisons to provide adequate care, forcing them to spend the amount of money that was required to do it right, that we would stop the growth of prisons because it would be too expensive.” In many of the states in which prison plaintiffs successfully pursued systemwide court orders, there was indeed a huge impact on prison budgets. In fairly

30 See E-mail from John Boston, Dir., Prisoners’ Rights Project, New York City Legal Aid Soc., to author (Oct. 22, 2005) (on file with the New York University Law Review).
31 See Michael A. Millemann, An Agenda for Prisoner Rights Litigation, in 2 PRISONERS’ RIGHTS SOURCEBOOK 153 (Ira P. Robbins ed., 1980) (edited version of speech originally given in 1974 presenting this view, but arguing that litigation “run[s] the risk of invigorating, rather than discrediting, today’s prisons”). Millemann was one of the early staff attorneys at the ACLU National Prison Project.
short order, however, it became apparent that polities were not responding to the increased cost of imprisonment by decarceration of any type in adult facilities\(^{35}\) (juvenile decarceration was somewhat more prevalent\(^{36}\)). Indeed, there seemed to be little limit to the public’s willingness to spend on adult imprisonment. So, although the ACLU National Prison Project, for example, kept its mission statement’s reference to “reducing reliance on incarceration,”\(^{37}\) the goal of civilizing rather than emptying the nation’s prisons and jails became the more realistic aim for even a very comprehensive litigation strategy. Advocates (joined more or less, depending on the case, by their inmate clients), administrators, and judges set to, forging a new kind of administrative order for penal and detention facilities.\(^{38}\)

Although assessing the impact of the litigation is a complex topic well beyond the scope of this paper, it is clear that inmates gained much from the orders. For example, a case study of *Guthrie v. Evans*,\(^{39}\) the Georgia State Prison case that ended in 1985, summarized its positive effects:

The inhuman practices and conditions at [Georgia State Prison] that the special monitor described in 1979 no longer exist. The reign of terror against inmates has ended. Today, guards do not routinely beat, mace, and shoot inmates. Inmates and guards no longer die from a lack of safety and protection. Guards can walk the cells without having to carry illegal knives and pickax handles to protect themselves. The medical, mental, nutritional, educational, and rec-

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\(^{36}\) For a description of the movement for juvenile decarceration, see generally Rodney J. Henningsen, *Deinstitutionalization Movement*, in *ENCYCLOPEDIA OF JUVENILE JUSTICE* 114 (Marilyn D. McShane & Frank P. Williams, III eds., 2003).

\(^{37}\) E-mail from Alvin J. Bronstein, founder and former Director, ACLU Nat'l Prison Project, to author (Oct. 24, 2005) (on file with the New York University Law Review).


reational needs of inmates are now provided for. . . . Those changes were the result, in large part if not solely, of the Guthrie litigation. Inmate memoirs and writings confirm the point. For example, a 1979 article by Wilbert Rideau, then the (inmate) editor of the Louisiana State Penitentiary's \textit{Angolite}, gave credit to court-order litigation for reducing sexual violence:

While [rapes] used to be a regular feature of life here at the Louisiana State Penitentiary, they are now a rare occurrence. Homosexuality still thrives, but the violence and forced slavery that used to accompany it have been removed. In 1976, Federal District Court Judge E. Gordon West ordered a massive crackdown on overall violence at the prison, which paved the way for the allocation of money, manpower, and sophisticated electronic equipment to do the job. Since then, any kind of violence at all between inmates elicits swift administrative reprisal and certain prosecution. This, more than anything else, has made Angola safe for the average youngster coming into the prison today.

Many—though by no means all—other sources concur. Moreover, the effects of court orders are by no means limited to the systems in which they are entered. As I have suggested elsewhere, "orders also cast a marked general deterrent shadow on systems hoping to avoid them. And they have a mimetic impact, as other systems imitate them not out of fear but rather out of a more positive interest."

Prison and jail officials were frequently collaborators in the litigation. If they did not precisely invite it, they often did not contest it. And as I and others have observed, the remedies in the cases, frequently designed at least in part by the defendants themselves, very


\textbf{41} Wilbert Rideau, \textit{The Sexual Jungle} (1979), in Wilbert Rideau & Ron Wikberg, \textit{Life Sentences: Rage and Survival Behind Bars} 73, 94 (1992). The case mentioned was \textit{Williams v. Edwards}, No. 71-98 (M.D. La.); the order in question was affirmed by the Court of Appeals, 547 F.2d 1206, 1213-14 (5th Cir. 1977).


\textbf{43} Schlanger, \textit{Inmate Litigation}, supra note 7, at 1663.
much served what at least some of those defendants saw as their interests: increasing their budgets, controlling their inmate populations, and encouraging the professionalization of their workforces and the bureaucratization of their organizations. As one jail administrator put it:

To be sure, we used “court orders” and “consent decrees” for leverage. We ranted and raved for decades about getting federal judges “out of our business”; but we secretly smiled as we requested greater and greater budgets to build facilities, hire staff, and upgrade equipment. We “cussed” the federal courts all the way to the bank.

Even when the litigation was not simply justification for a larger budget, it was useful to prison and jail administrators seeking to solidify their control over their organizations. A prison official in Kentucky, describing a major court-order case about conditions at the Kentucky State Reformatory, explained that the consent decree in the case changed the whole system. It made the system unified. We had a cabinetwide policy and then institution policies clarified those. That’s the guideline by which you operate and function. We have all this training. The training uses all the policies and procedures, explains the importance of the policies and procedures.

The decrees professionalized and bureaucratized by the terms they imposed, but also by their impact on who was interested in becoming or qualified to become an administrator. As an inmate involved in the same Kentucky litigation observed:

But you know what? Guys like those old-time wardens can never be warden at LaGrange any more. That’s the beautiful thing about that consent decree. It made that system so damn sophisticated that you just can’t walk out of the head of a holler in Hazard, out of the logging woods, an’ walk right in and be the warden.

In short, court orders had an enormous impact on the nation’s jails and prisons by direct regulation, their indirect effects, and the shadow they cast. Among the areas affected were staffing, the amount of space per inmate, medical and mental health care, food,

44 See, e.g., Schlanger, Beyond the Hero Judge, supra note 7, at 2012.
48 Id. at 207 (quoting prisoner Wilgus).
hygiene, sanitation, disciplinary procedures, conditions in disciplinary segregation, exercise, fire safety, inmate classification, grievance policies, race discrimination, sex discrimination, religious discrimination and accommodations, and disability discrimination and accommodations—in short, nearly all aspects of prison and jail life, with the notable (if not quite universal) exceptions of education, custody level, and rehabilitative programming and employment.

B. The Purported Fading of the Structural Reform Injunction

As prison and jail court orders began to proliferate in the 1970s, scholars began to showcase these decrees, hailing or condemning the cases as the epitome of a new form of litigation—"public law litigation," or "structural reform litigation," Abe Chayes and Owen Fiss named it in their canonical treatments.\(^49\) During the 1970s and 1980s, the jail and prison cases provided a field for sustained scholarly debate about the intertwined issues of legitimacy and capacity—that is, the appropriate role of courts in light of democratic theory and limited judicial competence.\(^50\)

Through the 1990s, however, the volume of scholarly commentary diminished and a shared historical account, told by both the litigation's defenders and its detractors, emerged as conventional wisdom. This account explained that civil rights injunctive practice seeking to transform governmental institutions in a wide variety of settings and ways occurred because judges—misguided or heroic, depending on the ideology of the narrator—took it upon themselves in the 1970s and 1980s to impose their vision of humane policy on the nation. This moment of judicial imperialism (as right-leaning authors perceived it), or of appropriate judicial concern for the rights of unempowered Americans (as left-leaning authors argued), is largely gone now, the account continued,\(^51\) mostly because it has been "throttled by the Supreme Court under Chief Justices Warren Burger and

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\(^{49}\) Chayes, supra note 23, at 1284; Owen M. Fiss, Foreword: The Forms of Justice, 93 HARV. L. REV. 1, 2 (1979).

\(^{50}\) For defenses of judicial legitimacy and capacity, see generally Fiss, supra note 49 and Ralph Cavanagh & Austin Sarat, Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence, 14 LAW & SOC'Y REV. 371, 376 (1980); and against them, see generally DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977) and Nathan Glazer, Towards an Imperial Judiciary?, 41 PUB. INT. 104 (1975). PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983) is also extremely useful, although less easily categorized.

\(^{51}\) See, e.g., MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 145 (1998) (arguing that litigated reform of prisons had, by the late 1980s, "run its course"); Richard L. Marcus, Public Law Litigation and Legal Scholarship, 21 U. MICH. J.L. REFORM 647, 648 (1988) ("Chayes's focus on public law litigation seems ill-conceived because the inci-
William Rehnquist."  

Ninth Circuit judge and former labor lawyer Marsha Berzon recently stated, a bit wistfully perhaps, that "'structural injunctions' have receded from the remedial scene"; those that remain, another account argues, "appear to be vestiges of a bygone era." Accordingly, the conventional wisdom continues, the late 1980s and the 1990s were a time of fading ambition for would-be reformers: "[B]y the end of the twentieth century most of the planned litigation campaigns had petered out," replaced by "catch-as-catch-can" litigation against "targets of opportunity in an increasingly conservative judicial climate." Malcolm Feeley and Edward Rubin's recent summary of the mid-1990s state of play in correctional court-order practice is consonant with this more general take on civil rights practice. By the 1980s, they explain, prison litigation was in its endgame: "No systemwide suits had been successful for years, and courts began terminating long-standing court orders and consent decrees." 

Different scholars have attributed the decline of the civil rights injunction to different forces. Probably the most common explanation is the increasing conservatism of the federal bench. As illustrated by the quotation above attributing structural reform litigation's demise to Burger/Rehnquist Court strangulation, some attribute the change to doctrinal shifts imposed on lower courts by the Supreme Court. Others pin the blame or praise not on particular doctrinal shifts but broader attitudinal ones. For example, Myriam Gilles suggests that "the structural reform injunction has disappeared from the contemporary sociolegal landscape because of the essentially political fear of judicial activism." The anti-activist attitude, she argues, has moved courts to erect "procedural barriers" that have "all but denied litigants the ability to bring claims in federal court that challenge widespread
and systemic practices that violate individual rights and constitutional guarantees."\(^{58}\) Taking a less jurocentric approach, still others have attributed the fading of public law litigation to factors connected with plaintiffs' lawyers. In one interesting recent analysis, Mark Tushnet explores the fading of planned litigation campaigns, the source of some of the flashiest public law litigation. He explains that planned litigation is simply not sustainable in many arenas, first because lawyers lack the degree of control they need to act strategically, and second because of its vulnerability to legislative obstacles, including the defunding of plaintiffs' lawyers and outright legislative override.\(^{59}\)

In any event, the generally accepted view has for some time been that civil rights injunctive practice has become essentially moribund. In the arena of prison and jail litigation, then, the Republican 100th Congress's 1996 intervention was essentially a move that could be expected finally to put the few lingering correctional court orders out of their misery, without having much broader impact. The Prison Litigation Reform Act, passed as part of Newt Gingrich's *Contract With America*\(^{60}\) (albeit with quite a bit of Democratic support\(^{61}\)), imposed numerous restrictions on entry of new jail and prison orders and continuation of old ones. Nonetheless, consistent with the story of decline just set out, observers in the late 1990s explained that "[i]t is not clear how much real effect" the PLRA would have, because "many of the mega-conditions cases that were initiated in the 1970s had already been terminated or were already winding down by 1994 or 1995, and there was general consensus that new suits attacking an array of conditions were not likely to emerge."\(^{62}\) According to another commentary, the PLRA was essentially a "symbolic statute[ ]," because "the courts had already done most of what the Republican legislation sought to accomplish"—that is, courts had already limited the availability of relief to prison and jail plaintiffs and allowed institutional defendants various ways out of entered decrees.\(^{63}\)

\(^{58}\) Gilles, *supra* note 54, at 163.


\(^{61}\) See *supra* note 19 and accompanying text.

\(^{62}\) Feeley & Rubin, *supra* note 51, at 383–84. By 2003, however, Feeley and Rubin had slightly shifted emphasis, explaining that the PLRA "has made it significantly more difficult for prisoners to bring claims in federal courts," and describing the statute as "important" in its effect. Rubin & Feeley, *supra* note 56, at 661–62.

D. Explanations for the Mid- to Late-1990s Shift in the Volume of Court-Order Regulation

The prior Sections have shown that there was stability in the volume of court-order regulation from the mid-1980s to the mid-1990s, followed by a major change. The census data have demonstrated as much, but they cannot explain why this contraction occurred. In this Section, I analyze potential explanations. The explanation I find most persuasive is ready at hand: The Prison Litigation Reform Act was enacted in 1996, after the 1993 and 1995 jail and prison censuses and before those in 1999 and 2000. There was a good deal of litigation over the PLRA’s constitutionality in its first two years, but one would expect the statute’s effects, if any, to begin to emerge by 1997 or 1998—perfect timing for their appearance in the 1999 and 2000 censuses.

Four provisions of the PLRA seem extremely relevant. The first allows defendants unhappy with a court order that is older than two years to seek “immediate termination,” which is to be granted unless the order “remains necessary” to correct a “current and ongoing” violation of federal rights. The second provision grants defendants an “automatic stay of extant orders,” thirty to ninety days after immediate termination proceedings are initiated. The third requires inmates to utilize administrative grievance channels prior to filing a suit in federal court. The fourth limits the availability of attorneys’ fees for lawyers who successfully represent inmates in civil rights cases.

120 In 1983, the census did not ask about order subject matter, so no analysis of changing subject matter is possible until 1993, the second time the census gathered the relevant data. See infra note 179 for a description of the order subject matter categories addressed in each census.
After discussing these four PLRA provisions, as well as another less important provision, I examine three competing explanations that do not involve the PLRA: increasing conservativism of the federal bench, doctrinal innovations of the mid-1990s restricting injunctive remedies, and declining funding for inmates' advocates. These are the lead explanations scholars have offered in support of the conventional wisdom of a 1980s-1990s decline in public law litigation. As already seen, the census data undermine that claimed decline, at least for jail and prison court orders. But can those same phenomena explain instead the decline that does appear in census data, in the mid- to late-1990s? As I discuss below, I do not think they are the major levers of change. Both because of its timing and content, the PLRA is a far more persuasive explanation.

1. The PLRA and the Declining Volume of Court-Order Regulation

The correctional censuses do not include information on litigation and therefore shed no light on the causes of the decline in court order incidence. But court opinion after opinion states that it is the PLRA that created the opportunity for defendants to seek an end to old court orders.121 And many—though by no means all—participants report the PLRA as a dominant reason that orders have become not only shorter-lived but also harder for plaintiffs to obtain.122 I consider in turn four provisions of the PLRA—those governing immediate termination, the automatic stay provision, administrative exhaustion, and attorneys' fees.

Immediate termination. Before the PLRA's enactment, the law on prospective relief in civil rights cases was that such relief would remain in effect until defendants fully complied with the judgment and somehow satisfied the court (or the plaintiffs, who could choose not to oppose the relevant motion) that they were unlikely to relapse.123 The PLRA opened prison and jail orders to far more ready challenge. The statute entitles defendants to "immediate termination"

121 There are dozens of opinions on the PLRA termination provisions that arose in a proceeding where defendants sought to terminate existing court orders. See, e.g., Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 663 (1st Cir. 1997) (approving termination of decree governing Suffolk County Jail in Boston); Dougan v. Singletary, 129 F.3d 1424, 1427 (11th Cir. 1997) (remanding for termination of order concerning Florida death row conditions); Gavin v. Branstad, 122 F.3d 1081, 1083, 1092 (8th Cir. 1997) (remanding for consideration of termination motion relating to Iowa State Prison); Plyler v. Moore, 100 F.3d 365, 368, 375 (4th Cir. 1996) (affirming termination of order governing South Carolina prisons).

122 See Telephone Interview with Elizabeth Alexander, Dir., ACLU Nat'l Prison Project (Mar. 29, 2001).

123 See Louisiana v. United States, 380 U.S. 145, 154 (1965) (remarking that courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the [unlawful] effects of the past as well as bar like [illegality] in the future").

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of any prospective relief two years after that relief is granted, unless the court finds "current and ongoing violation" of federal rights. And defendants can renew their request for termination yearly. Because a very large majority of correctional court orders are more than two years old, the PLRA allows most counties, cities, or states unhappy with an order to simply move to terminate it. Sure enough, between 1996 and 2000, a large number of jurisdictions filed termination motions. Plaintiffs' counsel were successful in defending some of the old orders, for a time by attacking the PLRA's constitutionality (until the Supreme Court effectively decided the issue), and also by litigating the ongoing need for conditions remedies. Inevitably, however, plaintiffs lost some of those contests, and the victories they achieved came at the cost of new projects. Thus, by forcing inmates' advocates into rear-guard actions that were only partly successful and that took the place of assaults on additional targets, the PLRA's immediate termination provision both shrank the stock of old orders and slowed the flow of new ones.

**Automatic stay.** Not only does the PLRA empower defendants to control the litigation agenda, it simultaneously accelerates the termination litigation in a way that sharply disadvantages plaintiffs. Between one and three months after a defendant moves to terminate relief, the order is automatically "stayed" until the court reaches its termination decision. This has two important effects. First, the speed of the decision clock gives the defendant an important advantage: Defendants get to decide when the race will begin, and they can pick the start date with an eye to their own convenience, or perhaps the inconvenience of opposing counsel. The second advantage

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126 In Ruiz, for example, the plaintiffs simultaneously defended on both law and facts; they first won on both. Ruiz v. Johnson, 37 F. Supp. 2d 855, 939 (S.D. Tex. 1999) (finding constitutional violations in conditions of confinement in Texas prison system, and holding PLRA unconstitutional). After the statutory challenge failed on appeal, Ruiz v. United States, 243 F.3d 941, 945 (5th Cir. 2001), the plaintiffs litigated conditions for three more years. See Ruiz v. Estelle, No. 4:78-cv-00987 (S.D. Tex. June 17, 2002) (docket entry 9015, granting termination motion) (docket available via PACER and as document PC-TX-003-000 at http://clearinghouse.wustl.edu).
128 When I was a lawyer for the Department of Justice, for example, I recall that one state filed a dozen such motions—one in each of its corrections cases—on July 3, and served them by mail. The lead lawyer on the case in which I was involved did not open the motion until after a long weekend and several days vacation, about a week later. On a thirty-day timeline, that lost week was very precious. (Not until later in 1997 were district
defendants gained by enactment of the automatic stay is more substantive. A termination motion effectively puts plaintiffs to their proof on the ongoing necessity of court-order regulation. Assembling that proof in just thirty days can be extremely difficult, as it requires both knowledge of specific harmful events at a set of closed facilities and expert testimony about the connection between those events and claimed operational failures.

Administrative exhaustion. Prior to the PLRA, inmates seeking to file lawsuits generally were not required to first run their complaints through whatever grievance system their incarcerating authority had implemented. The PLRA changed that rule: Now, prior to bringing their lawsuits, inmates must make their complaints to prison or jail authorities using available administrative grievance procedures. Plaintiffs' failure to exhaust can lead to dismissal of their cases. The exhaustion rule establishes an extremely difficult hurdle for many of the inmates who bring damage actions, usually without


132 It is by no means clear that dismissal is what ought to follow flawed attempts to exhaust. Exhaustion can equally be a requirement governing the timing of judicial review, not its ultimate availability. Some courts have, indeed, applied this general approach to the PLRA. See Ngo v. Woodford, 403 F.3d 620, 631 (9th Cir. 2005) (holding judicial review of inmates' claim available notwithstanding even untimely administrative appeal); Thomas v. Woolum, 337 F.3d 720, 723 (6th Cir. 2003) (same). But see, e.g., Johnson v. Meadows, 418 F.3d 1152, 1154, 1157 (11th Cir. 2005) (holding PLRA's exhaustion requirement akin to procedural default rule, and cataloging cases similarly resolved by other circuits). The Supreme Court will resolve this issue soon. See Woodford v. Ngo, 403 F.3d 620 (9th Cir. 2005), cert. granted, 126 S.Ct. 647 (2005) (No. 05-416).

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counsel, because they are frequently unable to navigate cumbersome and confusing grievance procedures. 133 This problem applies in injunctive litigation with somewhat diminished force, because injunctive cases have lawyers. Nonetheless, advocates complain that the exhaustion rule poses extremely difficult challenges, because it takes time for lawyers to get involved and grievance systems can set very tight deadlines for inmates. In Kentucky’s system, for example, a grievance is timely only if filed within five working days of the grieved incident.134

Attorneys’ fees limitations. The PLRA’s limitations on attorneys’ fees have also been at least somewhat important. As in many sections of the civil rights bar, inmates’ advocates financed a good deal of their activity prior to the PLRA by the fee-shifting that accompanied successful litigation.135 The PLRA drastically limited the rates that advocates could obtain, setting the maximum rate at 150% of the rate “established”136 for payment of criminal defense lawyers. At the time of the statute’s passage, this meant a maximum hourly rate of $112.50, as opposed to the several hundred dollars per hour experienced lawyers had previously been paid.137 Those higher fees had typically been

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133 See Schlanger, Inmate Litigation, supra note 7, at 1649–54 (discussing difficulties exhaustion requirement presents to inmate litigants).


137 See, e.g., Madrid v. Gomez, 190 F.3d 990, 993 n.2 (9th Cir. 1999). The court stated: Thus, when the PLRA applies, the maximum allowable rate is $112.50 per hour, as compared to the rates authorized by the district court, which ranged from $155 per hour to $305 per hour. The two attorneys most involved in the remedial phase of this case charged $305 per hour and $290 per hour, respectively.
used to finance litigation outlays, and their cutback has caused advocacy organizations some financial strain.\footnote{E-mail from Elizabeth Alexander, Dir., ACLU Nat'l Prison Project, to author (Oct. 22, 2005) (on file with the New York University Law Review).}

**Red herring: The PLRA's limitation on entry of prospective relief.** Finally, the PLRA has a provision that might seem important in causing the decline in reported court-order coverage. I suspect, however, that it is not. The statute's prospective relief limitations dictate that federal courts, and state courts hearing federal claims, may neither grant nor approve any relief other than money damages, “unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.”\footnote{18 U.S.C. § 3626(a) (2000).} Application of these limits to litigated relief was not a major change from prior law.\footnote{Lewis v. Casey, 518 U.S. 343, 357 (1996) (“The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established.”); Milliken v. Bradley, 433 U.S. 267, 280 (1977) (“The remedy must therefore be related to the condition alleged to offend the constitution . . . .”) (internal quotation marks and citation omitted); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (“[T]he nature of the violation determines the scope of the remedy.”); see also H.R. Rep. 104-21, at 24 n.2 (1995) (commenting, on bill provision that ultimately became 18 U.S.C. 3626(a), that “dictates of the provision are not a departure from current jurisprudence concerning injunctive relief”).} But, of course, most cases settle, and application to settlements, by contrast, was a quite startling innovation.\footnote{See Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 389 (1992) (explaining that injunctive settlements may extend well past what might permissibly be entered in litigated decrees).} Indeed, it might have been expected that few defendants would settle a case on such terms (particularly if the findings were to be given preclusive effect in subsequent damage action litigation). It turns out, however, that the institution of settlement is extremely resilient. The statute expressly allows parties two methods to avoid application of the provision. They may negotiate “private settlement agreement[s],” enforceable in state court as contracts.\footnote{18 U.S.C. § 3626(c)(2)(B) (2000).} Or they may agree to a conditional dismissal of a federal lawsuit, upon satisfaction of some negotiated terms; if the defendant fails to comply, the court reinstates the case, though it cannot enforce the agreement.\footnote{18 U.S.C. § 3626(c)(2)(A) (2000); see also Fed. R. Civ. P. 41(a) (governing voluntary dismissals, including conditional dismissals).} Probably even more prevalent, however, is a magic words strategy: Participants report that “[i]n practice, parties who wish to
settle agree to these findings and the court approves them.”144 The PLRA’s prospective relief limit may be undermining the effectiveness of court-order regulation, but it is unlikely that it is severely undermining the very existence of court orders.

Next, I canvass non-PLRA explanations for the decline in court orders reported in the last census.
Mass Incarceration and the Paradox of Prison Conditions Litigation

Heather Schoenfeld

In this article I examine how prison conditions litigation in the 1970s, as an outgrowth of the civil rights movement, inadvertently contributed to the rise of mass incarceration in the United States. Using Florida as a case study, I detail how prison conditions litigation that aimed to reduce incarceration was translated in the political arena as a court order to build prisons. Drawing on insights from historical institutionalist scholarship, I argue that this paradox can be explained by considering the different historical and political contexts of the initial legal framing and the final compliance with the court order. In addition, I demonstrate how the choices made by policy makers around court compliance created policy feedback effects that further expanded the coercive capacity of the state and transformed political calculations around crime control. The findings suggest how “successful” court challenges for institutional change can have long-term outcomes that are contrary to social justice goals. The paradox of prison litigation is especially compelling because inmates' lawyers were specifically concerned about racial injustice, yet mass incarceration is arguably the greatest obstacle to racial equality in the twenty-first century.

In the late 1960s, prison inmates in the United States drew inspiration and resources from the movement for black civil rights in order to challenge prison conditions and practices through the federal courts (Cummins 1994; Jacobs 1980; Strum 1993). The civil rights lawyers who represented them not only sought to extend hard-fought “rights” to prisoners, but they also “had extraordinary high hopes that . . . [prison conditions] litigation, and in particular overcrowding litigation” would reduce states’ reliance on incarceration (Schlanger 2006:560). Prisoners and their lawyers throughout the 1970s and 1980s were largely successful: By 1993, 40 states were under court order to reduce overcrowding and/or eliminate
unconstitutional conditions of confinement (Sturm 1993). Yet despite the noted “success” of prison litigation, the decarceration goals of lawyers were never realized.1 In fact, just the opposite occurred: Since 1973, the incarceration rate in the United States has grown by 700 percent (Western 2006:13).

In this article I ask how prison conditions litigation intended to reduce the state’s reliance on incarceration eventually contributed to unprecedented prison growth. This question is important because despite recent restrictions on litigation by inmates, “the civil rights injunction is more alive in the prison and jail setting than the conventional wisdom recognizes” (Schlanger 2006:555). In addition, this question complicates explanations of the new “culture of control” or “law-and-order” politics that foreground the backlash to the civil rights movement (Beckett 1997; Garland 2001; Weaver 2007) by suggesting that mass incarceration is also a result of policies that complied with civil rights litigation. Finally, the paradox of prison litigation in the United States is especially compelling because inmates’ lawyers were motivated by concerns for racial justice: Particularly in the South, prison reform litigation targeted historical racial inequities in the prison system (Feeley & Rubin 1998; Yackle 1989). Yet the growth of incarceration over the last 30 years has been disproportionately concentrated on poor black communities and has arguably reinscribed second-class citizenship on black Americans since the civil rights movement (Wacquant 2002; Western 2006).2

Although some existing scholarship characterizes prison litigation as a “double-edged sword,” it has not systematically examined how specific prison litigation contributed to the rise of mass incarceration at the state level (Feeley & Swearingen 2004:466; Schlanger 1999). Using Florida as a case study, I demonstrate how the legal challenge to the grossly inadequate condition of state prisons, Costello v. Wainwright (1975) (hereinafter “Costello”), was a product of developments in civil rights law and legal activists’ concerns for racial justice. Given the liberalization of racial politics in Florida, the national consensus on rehabilitation (and less secure confinement for offenders), and the state’s widespread efforts at reform, inmates’ lawyers hoped that the litigation would force Florida state policy makers to rethink their conservative penal policy. Yet between the negotiation of the court order in the late 1970s and its enforcement in the late 1980s, the political context had changed

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2 In the United States, 1 in 15 adult black men versus 1 in 106 white men are in prison (Pew Center on the States 2008:34).
from reform to retrenchment (Pierson 1994). Increasingly, the dominant political discourse depicted black citizens as drains on the state rather than rightful claimants of equal opportunity (MacLean 2006), and criminal offenders as objects of “risk” rather than rehabilitation (Feeley & Simon 1992). In this new context, policy makers began to understand the problem as not too many people in prison but the risk of too many people being released from prison. Thus, state policy makers translated the court order on overcrowding as an order to build prisons. In the long run, compliance with the court order increased the state’s capacity and willingness to incarcerate, leading to the further expansion of incarceration throughout the 1990s in ways that continued to disproportionately impact black Americans (see Figure 1).

To explain how policy makers translated compliance with prison litigation as an order to build prisons, I present a chronological “strategic narrative” of Costello (Pedriana & Stryker 2004; Stryker 1996). The narrative details the translation of Costello across a changing political and social context between its origins in 1973 and final compliance with the court order in 1993. To do this I draw on a variety of primary data, including state records, court documents, newspaper articles, and 54 formal interviews with key actors (see Methods Appendix for details). Throughout the narrative I highlight the key decisions that directed the course of the litigation and its implementation in social policy in ways that put the state on the path toward mass incarceration.

Note that my findings highlight a previously unconsidered explanatory factor in the rise of mass incarceration: the role of prison conditions litigation. Specifically, I find that prison conditions litigation was a mediating factor in the politicization of punishment. Politicians’ interpretation of the litigation created a platform by which they could draw on cultural distrust of the state (Zimring et al. 2001; see also Lynch 2010) and racialized fears of criminals (Russell-Brown 2008) for their political advantage. Consequently, the translation of prison litigation in the political arena can help explain some of the contemporary features of “governing through crime,” such as its bipartisan support, the zero-sum game between criminals and victims (Garland 2001), and the value of prison “capacity” regardless of prisons’ ability to lower the crime rate (Simon 2007).

More broadly, my findings point to new reasons that positive legal outcomes for the disadvantaged may not be sufficient for reducing inequality in the long term. Beyond those detailed in other scholarship, such as the “myth of rights,” the need for
congruent political mobilization, the presence of symbolic victories, and the limits of court enforcement, I argue that research should examine how “progressive” court orders are “translated” into social policy by lawmakers. Specifically, I find that the contingencies of timing and the broader political and social context over which litigation unfolds can cause unintentional and unfavorable terms of compliance. In addition, I argue that researchers need to consider how the translation process can produce “feedback effects” that ultimately bring about consequences that are quite opposed to the spirit of the initial legal mobilization.

Timing and the Translation of Compliance

This article builds on understandings of “legal translation” (White 1990, 1996), or how narrative and rhetoric underpin legal claims. I conceive legal translation as happening on both the front end and back end of litigation. On the front end, legal translation is “how reformers translate their moral values and political goals into . . . plausible legal claims and arguments” (i.e., legal framing) (Paris 2001:640). On the back end, it is how the language and content of court decisions is understood for the purposes of implementation. Research on legal translation is important because on the front end, legal framing shapes court opinions that, on the
back end, can “powerfully shape the language of politics” and the current and future “agenda of contention” (Paris 2006:1028; citing ideas in Brigham 1987). In particular, this article considers the ways in which timing influences how legal framing impacts the translation of compliance. This insight about timing, gleaned from historical institutionalist scholarship on social policy and institutional change, helps explain how legal “successes” in court can have detrimental impacts over the long run.

Contemporary scholarship in sociolegal studies examines not only the success or failure of court decisions, but also the contingencies and conditions that affect courts’ ability to bring about social change (McCann 2006; Stryker 2007). Important for the case of institutional reform litigation, this scholarship finds that court procedure, which requires lawyers to choose one particular legal argument, can lead to a narrow reframing of disputes and narrow definitions of social problems (Bumiller 1988; Coglianese 2001; McCann 1992). In the case of civil rights litigation, the focus on liberal notions of freedom, i.e., “negative rights” or freedom from coercion, gives way to a remedy that “merely neutralizes the inappropriate conduct of the perpetrator,” rather than positively affirming the self-determination of the victim (Freeman 1995:29; Frymer 2005; Roberts 1995). The construction of prisoners’ rights fell squarely into this negative rights tradition, as the courts ruled that Florida inmates had a right to be free from immediate physical violence brought about by overcrowding and inadequate medical attention. This framing precluded consideration of whether those in prison should have been there in the first place—even though this was part of the larger critique waged by the prisoners’ movement (see Jackson 1972).

In a recent article, Paris (2006) imagines new realms of research analyzing change agents’ conscious or unconscious choices about how to frame their claims in the legal arena. While this research agenda is important, it neglects an essential part of the processes by which law brings about social change. Instead, this article focuses on legal translation on the back end—the conscious or unconscious choices by those responsible for implementing court decisions. The contention that “law is a language into which other languages must be continuously translated” holds true in reverse: implementation requires the translation of the language of law into other languages, including the language of compliance, social policy, and politics (White 1996:55, cited by Paris 2006:1026). This is not to say that prison reformers’ early choices for framing legal claims did not matter—they certainly did. But researchers need to better understand how the language of the court is ultimately understood in the political arena by those responsible for compliance.
Scholarship on legal framing has also recognized that the convergence of social movement strategy and legal discourse can help account for the “success” of some reform litigation (McCann 2006; Paris 2001). Numerous empirical case studies have demonstrated that court decisions are more likely to lead to change in policy (on the books and on the ground) when complemented by active political pressure from below (McCann 1994; Melnick 1994; Paris 2006; Pedriana 2006; Pedriana & Stryker 2004; Ziv 2001). However, the effect of timing on the convergence between legal framing and political strategy has often been overlooked. In addition, legal scholarship has not sufficiently considered the impact of timing on the convergence between political context, policy implementation, and court enforcement—generally thought to be the weakness of courts (McCann 2006:32). Yet historical institutionalist scholars have created multiple theoretical models that elucidate how the timing of policy initiatives influences future practices and institutional development (Pierson 2004; Thelen 1999). This work can be applied to legal initiatives in ways that demonstrate how the lasting impact of court decisions depends on the timing of legal translation.

For example, advocates of “path-dependent” explanations hypothesize that timing and the substance of decisions have independent causal effects on social outcomes:

Specific patterns of timing and sequence matter; starting from similar conditions, a wide range of social outcomes may be possible; large consequences may result from relatively “small” or contingent events; particular courses of action, once introduced, can be virtually impossible to reverse (Pierson 2000:251).

In law, path dependency occurs when the “ideational constraints of liberal legal doctrine” (Paris 2001:637) restrict the content of judicial decisions, which in turn “block one path of development while encouraging another” (Stone Sweet 2002:119); or when the system of legal precedent creates a branching quality to the law as “each step in one direction increases the likelihood of additional steps in the same direction” (Hathaway 2001:628; see also Cunningham 2006; Gillette 1998; Posner 2000).

In explaining policy outcomes historical institutionalist scholarship points out that the when of policy innovation can be as important as the what of policy ideas (Weir 1992). Or in the case of legal outcomes, the timing of litigation with historical and political context can be more important than the legal arguments themselves. Similar to scholarship that recognizes courts’ inability to control the temporal order of cases that come before them (Stone Sweet 2002), the case of prison litigation in Florida demonstrates that plaintiffs do not control the speed of the court process. As a
result, while the initial framing by legal activists may be congruent with their goals in one political context, the actual period of compliance can take place in a different historical and political context that undermines litigators’ original goals.

The contingencies of legal translation can have long-term “policy feedback” effects. Policy feedback is the idea that past policy shapes politics or the language and capacity of interest groups to frame and enact subsequent policy (Orloff 1993). Policy decisions will have significant feedback effects when they create large institutions, organize beneficiary groups, or are embedded into economic and social structures (Hacker 2002). The same can be said for legal decisions that become embedded in social policy. In the case of prison litigation in Florida, the framework of the consent order became institutionalized in state law in ways that structured political contention and limited the options for court compliance. In turn, the translation of compliance created new resources, incentives, and opportunities that changed political and policy calculations around crime control.

Legal Translation on the Front End

The Foundations of Prison Litigation in Florida

Similar to other prison litigation across the country in the 1970s, the prison conditions litigation in Florida was a product of the personal biographies of civil rights lawyers, specific developments in civil rights law itself, and newly available resources for legal challenges to civil rights violations (Smith 1974; see generally Greenberg 2004; Thomas 1988). The case study of Florida supports Schlanger’s (1999) contention that the source of prison litigation is best described not just by the actions of activist judges (Feeley & Rubin 1998), but by “looking, instead, at the interaction between sympathetic judges and a set of advocates who saw a potential for urging change by lawsuit and had both resources to bring case after case and expertise to work effectively within the legal frameworks governing both contested and settled orders” (Schlanger 1999:2030).

The plaintiffs in Costello were represented by Tobias Simon, a local veteran civil rights attorney who had defended Dr. Martin Luther King Jr. and supporters in St. Augustine, Florida, during one of the more violent clashes of the civil rights movement (Associated Press 1964). In the late 1960s, Simon, motivated by the racial disparities in death sentences, turned his attention to death penalty cases in Florida (Greenberg [1985]2004:479). Simon’s trips to death row exposed him to the brutal conditions at Florida State...
Prison, where cells designed for two housed 10, and inmate “medics” provided medical “treatment” to other inmates. Looking for an opportunity to address overcrowding, in 1972 Simon agreed to represent two inmates who had filed a complaint in the United States District Court for the Middle District of Florida about inadequate medical care at Florida State Prison. District Judge Charles R. Scott, one of the active pro-civil rights judges in the South, knew Simon well and had previously signaled his respect for the “advantages of the class device” in Simon’s work on the death penalty (Adderly v. Wainwright 1972:400). Within a few months, Simon had added overcrowding to the complaint, and Judge Scott certified it as a class action on February 22, 1973. Extending the successful framework from death penalty lawsuits, the amended complaint sued Louie Wainwright, the director of the Florida Division of Corrections (later renamed the Florida Department of Corrections [hereafter “FDOC”]), for relief from overcrowding and inadequate medical care that caused “substantial harm to inmates in violation of the Eighth Amendment prohibition against cruel and unusual punishment.” Specifically, Simon asked the court to compel state officials to “re-distribute” or “reduce” the prison population in one of three ways: “either stem the influx of inmates . . .; accelerate the discharge of qualified inmates . . .; or allocate adequate funds and facilities to care for the ever-expanding inmate population” (Amended complaint, 2 Jan. 1973).

While the lawsuit did not specifically challenge racial injustice—as deplorable prison conditions equally impacted black and white inmates—it addressed racial inequality in at least three regards. First, as mentioned above, the key actors initiating the case—Simon and Judge Scott—were themselves motivated by concerns about racial inequality. And in directing the course of Costello, they drew on their civil rights litigation experience and doctrinal and procedural precedents established in desegregation and other civil rights cases. Second, at the time racial inequality pervaded all state...
institutions in Florida, including the penal system (V. Miller n.d.). In their court filings, the plaintiffs repeatedly blamed the overcrowding on “governmental neglect,” which was due to the legacy of racialized penal servitude in Florida (DuBois 1901; Mancini 1996) and the dominance of Northern rural segregationist legislators, who opposed spending money on black prisoners (Schoenfeld 2009). In a nod to the legacy of slavery, in his first order Judge Scott reproached the defendants that “a free democratic society cannot . . . stack [inmates] like chattels in a warehouse” (Costello v. Wainwright 1975:38). Finally, this same legacy contributed to Florida’s “highly conservative criminal justice policy,” which relied on “excessive use of imprisonment by the courts” (Ohmart & Bradley 1972:A-1). As Simon’s statements later indicated, he hoped that the lawsuit would force state legislators to amend Florida’s penal culture, beginning by releasing nonviolent offenders and reforming sentencing in order to divert offenders from prison (Interview, Elisabeth DuFresne, inmate lawyer, 21 Sept. 2009). And similar to the eradication of the death penalty and the provision of social services for the poor (Davis 1995; Greenberg 2004), these measures stood to disproportionately benefit black offenders, who at the time made up more than 55 percent of the prison population in Florida (compared to the less than 15 percent black population of the state; Florida Division of Corrections 1973:54; U.S. Bureau of the Census 1970: Table 24).

At the time, Simon’s hope that the state would reduce the prison population was understandable. First, there was a national move away from secure confinement. The National Advisory Commission on Criminal Justice Standards and Goals (1973) recommended halting prison construction and using community sanctions instead of prison sentences for all but the worst offenders. Second, Floridians had recently elected a “reform” governor, Reubin Askew, and court-ordered legislative reapportionment had brought a new cohort of more progressive policy makers to the state capitol, many of whom realized that recent federal court decisions on prison conditions meant they “would have to do something different” (Interview, Jim Tillman, former Florida State House Representative, 10 May 2007). In addition, the Attica prison riot in 1971 and subsequent riots across the country’s arguments on behalf of the plaintiffs (Costello v. Wainwright 1972). Simon drew on his relationship with and the resources of the Legal Defense Fund and the ACLU’s National Prison Project.

7 In 1971, the Eighth Circuit Court of Appeals affirmed the decision in Holt v. Sarver (1970) that the whole prison system in Arkansas constituted cruel and unusual punishment. Other early prison litigation cases include Taylor v. Perini (1972) (entering a consent decree for the Ohio prison system) and Battle v. Anderson (1974) (finding that several conditions in the Oklahoma prison system violated the Constitution).
prisons, including in Florida, sparked legislators’ concern about prison violence:

We had three and four people staying in a cell made for one person at the main prison. So overcrowded conditions and the fact that correctional officers were terribly underpaid and qualifications were if you had a broad back and a weak mind and could hit somebody over the head with a baton, you qualified to be a prison guard . . . our correctional system was just a boiling pot ready to explode (Interview, Jim Tillman, former Florida State House Representative, 10 May 2007).

Finally, administrators at the FDOC embraced the lawsuit. As overcrowding threatened to jeopardize the progress Wainwright had made “modernizing” the prison system, he welcomed the chance to use the court as leverage with state legislators (Interview, Louie Wainwright, 17 April 2007; Florida Division of Corrections 1973:45). In fact, in spring 1973, when Simon asked the court to restrict the FDOC from accepting more inmates into the system, Wainwright took it upon himself to do so. In addition, he signed a pretrial stipulation agreeing to “gross systemic deficiencies in the delivery of adequate medical care to inmates” and “severe overcrowding” in the prison system (Pretrial stipulation, 6 Dec. 1974).

The Costello Injunction

By 1975, the legislature had still not appropriated adequate resources for the prison system, and Governor Askew, facing a tough re-election campaign, had strictly forbade more system closures, so Simon refiled the application for preliminary injunction. Granted by Judge Scott, the injunction became both the legal and political cornerstone of the events that unfolded around Costello. As it met with the political reality on the ground, it guided both sides’ interpretation of the case and the resulting consent decree. In particular, three aspects of the injunctive order were important, including the definition of the problem, the substantive framework of the order, and the assumption of responsibility for relief.

First, the language of the injunction defined the problem as the immediate possibility of violence in overcrowded prisons. In his published decision, Judge Scott cited several medical experts and Wainwright, who all testified that the overcrowding created un-sanitary, unhealthy, and dangerous living conditions for the inmates. In addition, a fair amount of attention during the testimony, and in the reasoning for the court, involved the mental health of inmates, including the suggestion that crowded conditions put black and white inmates too close to each other and that this could lead to physical violence (Costello v. Wainwright 1975:12–14).
interpreting the problem as such, Judge Scott’s decision precluded a discussion of the underlying purpose and use of the prison system.

Second, in establishing the framework for relief, Judge Scott selectively relied on a report by the American Justice Institute (the “AJI report”) submitted in Simon’s application for injunction. He chose to use its concept of “prison capacity”—ordering the defendants to “reduce the overall inmate population” in five stages over one year to “emergency capacity,” defined as “the population beyond which the institution must be considered critically, and quite probably, dangerously overcrowded,” and in 18 months to “normal capacity,” defined as “that population which an institution can properly accommodate on an average daily basis” (Costello v. Wainwright 1975:34). Judge Scott specifically stated that the order was based on the nebulous concept of “capacity” rather than a fixed number, in order to motivate the “Division of Corrections to maintain its pertinacious program of developing further innovations to increase the capacity of the Florida penal system” (Costello v. Wainwright 1975:35).

It is important to note that Judge Scott chose not to point to some very specific remedies suggested by the AJI report that would have reduced admissions to the prison system, including increasing the age of youth that could be sent to prison, developing short-term incarceration options for minor offenders, or establishing a pre-commitment diagnostic service to the courts that had been shown to “divert a significant number away from the prison system” (Ohmart & Bradley 1972:B12–14). Thus by focusing the relief on “capacity” rather than a reduction of the prison population as originally asked for by the plaintiffs, Judge Scott’s order left open the possibility of compliance by prison growth.

Third, the decision placed the primary responsibility for reducing the population to “normal capacity” on the FDOC.

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8 As fully defined by the American Justice Institute:

“Normal capacity” [is] that population which an institution can properly accommodate on an average daily basis. It represents that population which best utilizes the resources currently available. It should include some vacant beds, to accommodate population surges, and to allow for different classifications of inmates within institutional totals.

“Maximal capacity” [is] the fullest possible use of the plant, given virtually unlimited program and staff resources.

“Emergency capacity” [is] the population beyond which the institution must be considered critically, and quite probably, dangerously overcrowded. It includes every bed in the institution which it is judged can safely be occupied at times of peak populations either due to intermittent and unpredictable population surges or to emergency and temporary circumstances (Ohmart & Bradley 1972:C-6; emphasis added).
However, in elucidating the ways to reduce overcrowding, Judge Scott touched on a number of means that required the cooperation of other institutional actors. For example, he suggested that the Florida Parole and Probation Commission could accelerate granting of parole, that courts could increase their use of pretrial intervention programs, or that the State of Florida could “simply construct or lease additional facilities” (Costello v. Wainwright 1975:39). However, by himself, Wainwright only had the authority to find ways to house inmates temporarily, or to award inmates between five and 15 days per month of “gain-time” (reductions to original prison sentences for good behavior, participation in programming, or other positive activity). Consequently, by placing responsibility for compliance on Wainwright, rather than the governor or legislature, Judge Scott’s order empowered the FDOC to direct the translation of compliance in ways that did not divert people from prison.

The Initial Reaction by Lawmakers: Delay and Limited Reform

The injunction hit state lawmakers like a “bombshell” (Interview, William Sherrill, former attorney for the Florida Department of Legal Affairs, 4 Feb. 2008). However, because of the legacy of Brown v. Board of Education (1954), instead of prompting legislators to “do something,” it prompted invectives against federal court interference. As one House Representative wrote to the Florida Sheriffs Association:

I want you to know that I am in complete agreement with your position. . . . The Federal Courts have stepped in to legislate conditions in our jails and once again the rights of criminals are vastly superior to those of honest, hardworking, taxpaying, law obeying citizens . . . we might as well sign a contract with the Hilton Hotel to come in and build and operate our penal system (if you can call it one) (Letter to Rayman Hamlin, President, Florida Sheriffs Association, 5 Feb. 1975).

Yet the state could not appeal the case on factual grounds because the FDOC had repeatedly conceded to the basic facts. Therefore, state attorneys appealed on the procedural grounds that because the injunction required Wainwright to violate the state law (by

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9 At the time, it was common practice by state corrections agencies to award “gain-time,” or “good time.” Florida had a history of controlling the prison population via gain-time. The first gain-time laws came about as part of the large overhaul of the Division of Corrections in 1957 (Fla. Laws 1957, ch. 57–121, sec. 25). At the time, gain-time credits were given to inmates at the discretion of the individual warden or prison supervisor. In 1963, the legislature spelled out a more generous, but uniform, schedule of gain-time credits, awarding each inmate a certain number of days’ credit for each month served depending on the length of the original sentence (Fla. Laws 1963, ch. 63–243).
closing the prison system to new entrants), the case needed to be heard by a three-judge panel (Interview, William Sherrill, former attorney for the Florida Department of Legal Affairs, 4 Feb. 2008). The delay tactic worked, and over the next two years the case went all the way to the Supreme Court.10

When the injunction was reinstated in May 1977, legislators responded ambiguously with lofty mandates, small reforms, and relatively little in the way of funding. As a result, FDOC administrators spent most of their time trying to figure out where to put newly arriving inmates:

> In those days . . . much of our time and energy went to finding bed space for the people who were being sent in. They [the legislature] hadn’t yet figured out that when you send someone to prison you have to have a bed and a place for them to stay. In the early days, it was our problem. I mean I heard legislators say in open meetings, “What are you going to do with your prisoners?” Those are actually the words [they used]. I told them, “These are the state of Florida’s prisoners” (Interview, Dave Bachman, former deputy director, FDOC, 28 March 2007).

Given the historical underfunding of the Florida penal system by the state legislature and the realization that the FDOC had no ability to stem the flow of inmates but would be held responsible anyway, FDOC administrators advocated changes to the gain-time laws for more leeway in releasing inmates (Fla. Laws 1978, ch. 78–304). Despite this new discretion, the FDOC still estimated that it would need 7,000 new prison beds because commitments to prison continued to increase (see Figure 2). In response, the state conducted a survey that relied on the same concepts of “capacity” as the injunctive order but labeled them “design capacity” and “maximum capacity” in order to arrive at different numbers—reducing the FDOC’s estimated need to 3,400 beds (Florida Department of Offender Rehabilitation, Bureau of Planning Research and Staff Development, 8 July 1976). The concepts of design and maximum capacity then became the framework for a settlement agreement reached almost two years later.

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10 Costello v. Wainwright, 525 F 2d. 1239 (Crt. of App. 5th Cir. 1976, affirmed), 539 F 2d. 547 (en banc), reversed and remanded, 430 U.S. 325 (1977). Relying almost completely on the lack of challenge to the constitutionality of the law in question, the Court clarified that the “temporary suspension of an otherwise valid state statute” in order to comply with court-ordered relief is not “equivalent to finding that statute unconstitutional” (Costello v. Wainwright 1977:328).
Sensing that the federal courts were turning against broad intervention in prison conditions cases, Simon worked with state lawyers on a compromise between his demand for a prison system based on “design capacity” and the state’s desire to maintain prisons at “maximum capacity” (Interview, Elisabeth DuFresne, inmate lawyer, 21 Sept. 2009). The result, the Overcrowding Settlement Agreement (OSA), approved in February 1980, stipulated that no individual prison could exceed maximum capacity (and could only be at maximum capacity for five days) and, most important, that the inmate population of the entire system could not exceed “design capacity” plus one-third. It defined “design capacity” as 40 to 90 square feet for inmates in individual cells and no less than 55 square feet per inmate in dorms; and “maximum capacity” as approximately 33 percent less space per inmate (40 to 60 square feet for cells and 37.5 square feet for dormitories), with double bunking allowed along outer walls (Costello v. Wainwright 1980). In addition, the FDOC agreed to no longer use three deteriorating buildings

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11 In May 1979, the Supreme Court held that lower courts should defer to the expertise of correction officials and that double-celling was not a violation of the Eighth Amendment (Bell v. Wolfish 1979). The Court’s subsequent rulings trended away from a broad interpretation of prisoners’ rights and comprehensive federal court intervention (Schlanger 2006).
for housing inmates. In exchange, the plaintiffs agreed to drop any liability claims and gave the FDOC five and a half years to comply with the consent decree.

Unlike the injunctive order, the Court emphasized the responsibility of not only Wainwright, but the governor and the legislature as well. In fact, although the U.S. Department of Justice and some national reformers felt that a settlement agreement was “premature,” Simon may have been more optimistic about state compliance because of the election of Bob Graham as governor (Personal communication, former law partner of Toby Simon, 20 March 2007). Having pledged to “exercise” his “authority and leadership” to implement the terms of the OSA, Governor Bob Graham appointed Simon and the state’s legal representative to a Governor’s Advisory Committee on Corrections charged with developing legislative mechanisms for compliance (Press release, governor’s office, 12 Nov. 1980).

The Institutionalization of the Costello Consent Decree in State Law

Notwithstanding the work of the Governor’s Advisory Committee, the OSA was only incorporated into state law after the state experienced a “prison overcrowding crisis” in spring 1982. In 1980, Wainwright had lobbied the governor for more prison beds, insisting that the FDOC had “no control over the growth of the system and the cost of providing care and supervision for the increasing number of inmates” (Letter to Governor Graham, 13 Jan. 1981). However, Governor Graham and the legislature, wanting to direct state funds elsewhere, were not forthcoming with additional resources (Florida House of Representatives 1996). Responding to ongoing revelations of brutality in the prisons, Judge Scott ordered an immediate status report, which revealed that 19 of the FDOC’s 25 institutions were operating above maximum capacity and that the FDOC had built temporary wooden housing in order to count 1,640 additional bed spaces (Report to the Court Pursuant to the Order of May 12, 1982).12 William Sheppard, who took over as lead counsel for the plaintiffs after Simon died of cancer, argued that the “plywood tents” were potential fire hazards and as such were an immediate threat to the inmates (Hearing on violation of settlement agreement, 6 July 1982). Although Judge Scott allowed them, he warned that “further recalcitrance in building adequate permanent facilities to house state prisoners will breed further woes for the defendants” (Order, 14 July 1982, pp. 8–9).

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12 According to Richard Dugger, the warden of Florida State Prison at the time, the temporary structures were not used to house inmates but were constructed in order to count the space when determining “maximum capacity” (Interview, Richard Dugger, former secretary of the FDOC, 22 March 2007).
The legislature responded by appropriating money for 2,000 more prison beds and convening a bipartisan task force to recommend solutions to the overcrowding crisis. Although the task force recognized public concern over crime, it also noted the fiscal consequences of a crime policy that relied too heavily on confinement (Corrections Overcrowding Task Force 1983). A similar sentiment was expressed by some members of the public:

Florida simply cannot afford to build more and more prisons. . . . But Florida, as many other states, is under a federal court order to reduce its prison population or provide more space. This pressure is valid because the courts have recognized the rights of inmates not to be treated as animals (The Evening Independent, 17 March 1983, Editorial, n.p.).

And indeed, the task force’s recommendations, codified in the Corrections Reform Act of 1983, included the implementation of sentencing guidelines and policies to stem the flow of offenders into prison through alternative court dispositions (including drug treatment and a stricter form of probation). The task force hoped that guidelines would “regulate the type of offenders who require incarceration . . . reduce their average length of stay . . . [and] foster greater public and professional confidence due to the honesty of the new system” (Corrections Overcrowding Task Force 1983:iii). The law even included an official goal to lower the state’s incarceration rate (Fla. Laws 1983, ch. 83–131).

Yet lawmakers also understood that guidelines and goals, in and of themselves, would not necessarily keep the prison population under maximum capacity—making additional statutory release mechanisms necessary. Thus, the 1983 reforms included new retroactive gain-time rules that shortened sentences by up to 50 percent and an emergency release gain-time mechanism to deal with “crisis overcrowding.” The latter, developed by the Costello lawyers in their earlier capacity as members of the Governor’s Advisory Commission on Corrections, required the FDOC to reward additional gain-time of up to 30 days, in five-day increments, to all inmates eligible to receive gain-time when the prison population reached within two percentage points of “system maximum capacity” (Fla. Laws 1983, ch. 83–131).

The decision to institutionalize the Costello consent decree through gain-time laws had significant feedback effects on the translation of compliance. While FDOC administrators could not compel prosecutors and judges to use the sentencing alternatives in the 1983 reforms, they could use the gain-time laws to compel legislators to fund more prisons. An FDOC administrator explained,

[The Overcrowding Agreement] helped us tremendously, because we finally had some standards. We wanted that. . . . So
we developed through that, housing standards—“maximum capacity” beyond which we wouldn’t be able to go without violating the Costello Agreement. That then gave us the hammer we needed to go to the legislature and say “look, we are within two percentage points of being in contempt of court, we have got to build more beds, or we are going to have to trigger this release mechanism”—and nobody wanted to do that, so they said, “We’ll give you money for more beds” (Interview, Dave Bachman, former deputy director, FDOC, 28 March 2007).

The Timing of Final Compliance

Despite a temporary reduction in the prison population in 1984 (Dykstra 1986), by 1985 the prison system was still overcrowded and the FDOC was scheduled to lose an additional 1,367 beds when it closed two units under the terms of the consent decree. In anticipation of noncompliance, and concerned about the safety of the FDOC’s temporary wooden housing, lead counsel Sheppard began filing notices of violation (e.g., Notice of Violation of Overcrowding Settlement Agreement and Motion for Order to Show Cause, 27 March 1985). Judge Scott’s successor, Judge Susan H. Black, reacting to the state’s slow response, appointed a Special Master and Monitor in order to significantly increase the court’s day-to-day monitoring of the prison system (Opinion and Order Preamble, 22 Aug. 1985). When coupled with the advent of the crack cocaine epidemic and a conservative shift in state politics, the timing of this pressure from the court marked a critical juncture that led to state officials’ decision to comply by building more prison beds.

Although President Ronald Reagan had declared a “war on drugs” in 1982, arrests for drug offenses in Florida grew only slightly before 1985. But in summer 1986, the media discovered crack cocaine, and Florida law enforcement and politicians committed new resources to the “fight” against drugs (Drummond 1988; Petchel 1987; Ritchie & Gallagher 1988). In the second half of 1986, arrests for sale and possession of cocaine in Florida jumped by 30 percent. The increased prosecution of cocaine offenses led to a spike in prison admissions: Between fiscal year 1986 and 1987, prison admissions increased by 7,400 offenders (or 33 percent). Forty-six percent of this increase was due to the increase in admissions for drug crimes (see Figure 3; FDOC 1987:38; 1988:28, 41). As others have noted, the increase in drug offender admissions had a disproportionate impact on black offenders (Mauer 1999; Tonry 1995): Between 1986 and 1990, the number of black offenders admitted to prison for drug crimes increased by 850 percent, while admissions for white drug offenders increased by 210 percent (statistical information from FDOC annual reports 1986–1990; available upon request).
The unprecedented number of prison admissions led to another overcrowding crisis that perfectly coincided with the arrival of a new Republican governor and a more conservative legislature. In January 1987, the new Secretary of Corrections, Richard Dugger, warned Governor Bob Martinez that the prison population was about to exceed 99 percent of design capacity. Realizing that Judge Black was “rapidly losing patience,” Governor Martinez quickly called a special legislative session to enact measures that could immediately reduce the emergency overcrowding, including new gain-time rules that gave additional discretion to the FDOC (State of Florida, Journal of the House: First Special Session “A”, 1987). However, the crack cocaine scare also prompted legislators to restrict gain-time for drug and habitual offenders. The legislature funded contracted jail beds, tent beds, and beds in converted industry buildings (Fla. Laws 1987, ch. 87–1). However, the court’s increased monitoring had made clear that “temporary” housing was an “unacceptable” long-term solution (Dahl 1987a), forcing the Martinez administration to develop a permanent solution to overcrowding and the Costello lawsuit.

Figure 3. Prison Admissions for Drugs as a Percentage of Total, 1980–1990. Source: Florida Department of Corrections Annual Reports; additional information available from the author.

13 When the prison population reached 98 percent of capacity, instead of requiring the FDOC to credit all inmates with five-day increments of gain-time, the new administrative gain-time mechanism allowed the FDOC to grant up to 60 days of administrative gain-time to all inmates with positive work evaluations, program participation, and/or behavior adjustment, except those serving mandatory minimum terms for drug crimes, firearm possession, and capital offenses. Sex offenders who had not received “treatment” and those sentenced as “habitual offenders” were also ineligible (Fla. Laws 1987, ch. 87–2).
As Governor Martinez had campaigned in the mold of President Reagan, he was predisposed to support aggressive policing and the use of prison (Nordheimer 1986). Former Governors Askew’s and Graham’s previous decisions to accelerate the release of inmates further guided Governor Martinez’s understanding of the state’s options under *Costello*. Consequently, the Martinez administration believed that “under the terms of the federal court order, inmates must be released early when a population cap is reached” (*St. Petersburg Times*, 19 Dec. 1986, Editorial, n.p.). Eager to reverse the “mistakes” of his predecessors, and under pressure from district attorneys and county sheriffs strongly opposed to “releasing inmates through the back door” (Interview, Ed Austin, former president, Florida Prosecuting Attorney’s Association, 21 Sept. 2008), Governor Martinez and Dugger began to advocate a new large-scale prison construction program. As Lieutenant Governor Bobby Brantley, who headed the initiative for Governor Martinez, explained,

> It is a hard thing [funding prisons] because . . . you’ve got educational needs and [the public] don’t want to . . . spend all this money on prisoners, because the public, they’ll tell you real quick [sic], “Oh yeah do what Governor Graham did, put ’em in tents.” I mean they’d bury ’em all if it was up to the public. But yeah we had to do it . . . there’s just not a whole lot more that anybody’s been able to come up with . . . other than lock ’em up (Interview, former Lieutenant Governor Bobby Brantley, 12 April 2007; emphasis added).14

In order to overcome the public’s and legislators’ resistance to prison construction, the Martinez administration used the threat of “early releases.” For example, the governor’s office sent state legislators (and local officials) lists of offenders from their districts who would be released if the state did not build more prisons: “I mean we actually did this, ‘Here’s a list of the people that are . . . going to be appearing in the neighborhood near you’” (Interview, former Lieutenant Governor Bobby Brantley, 12 April 2007). While some Democrats argued that Florida relied too heavily on incarceration and that the state budget lacked resources for drug treatment programs, they were also concerned that the new release mechanism would overwhelm their urban districts with prison releasees (Dahl & Nickens 1987). Thus, according to Jon Mills, the former

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14 Brantley’s recollection of his perception that the public opposed spending money on prisons was probably accurate for the time period. A poll commissioned by one of Governor Martinez’s political opponents found that only 15 percent of respondents favored the construction of new prisons (*St. Petersburg Times*, 20 May 1988, 6B). This perception changed by the mid-1990s when legislators repeatedly stated that the public wanted to lock up offenders “whatever it cost.”
Democratic Speaker of the House from relatively liberal Gainesville, Democrats also felt the urgency of the moment:

I think there was some looking ahead, but it was more viewed as this is what we have to do and there really are no other options and trying to work with the Department and work with the Governor and others to meet what was a situation that had backed up (Interview, Jon Mills, former Florida State House Representative, 26 April 2007; emphasis added).

Of course, the legislature did have other options, but none were as guaranteed to end the overcrowding. Lawyers from the Florida Justice Institute, for example, argued that the state should redouble its 1983 reform efforts and expand alternatives such as probation, restitution, community control, community service, and work release (Berg 1987). This argument, however, did not “hold water” with many legislators because “if somebody gets killed because you don’t have a [prison] bed . . . [or] the Federal Court tells you to release [a criminal offender] and they kill someone the next night, that’s not very good” (Interview, Robert Trammell, former Florida State House Representative, 1 May 2007).

This interpretation of the lack of options was compounded by the media’s coverage of the release program: Newspaper articles quoted judges, prosecutors, and defense attorneys worried about offenders returning to the community faster than expected (Dahl 1987b). Rightly or wrongly, the media blamed the early release mechanisms on the legislature, which then blamed the federal courts: “I don’t like letting them out on administrative gain time at all, but we’ve got to go by the federal guidelines until we build enough prisons to hold them” (former State Senator Wayne Hollingsworth (D) Lake City, quoted in Dahl 1987b). Despite new restrictions on potential releasees, in winter 1988 a repeat offender named Charlie Street, who had served only half of his prison sentence, killed two Miami police officers. Calling the incident “Florida’s Willie Horton,” the Miami Herald reported the crime in a tone meant to capitalize on racial fears:

NUMBNESS is the first reaction to the murders of Metro Police Officers Richard Boles and David Strzalkowski. Then, as the story unfolds, the shock gives way to rage. Screaming rage. Rage that cracks the veneer of civilization from one end of urban South Florida to the other. How could these two fine, dedicated police officers be dead, allegedly at the hands of a career criminal, an attempted murderer just 10 days out of state prison . . . (“Florida’s ‘Willie Horton,’” Miami Herald, 30 Nov. 1988, p. 24A).

Although it is not uncommon for released inmates to re-offend, because of the media attention and the national politicization of
prisoner releases, legislators felt the need to express their outrage by vowing to “build more prisons to make room for more criminals” (Dahl 1989:D1).

As a consequence of this series of decisions, legislators approved what would later be called “an aggressive prison construction program” (Florida House of Representatives 1996:13). Between 1987 and 1991, the legislature appropriated 27,087 “prison bedspaces” (or 20 major correctional institutions)—six times what had been appropriated in the previous five years (Florida House of Representatives 1996:13). Yet despite these new measures, because of increasing prison admissions and gain-time restrictions on drug offenders, the FDOC had to continue granting early release to inmates. In fact, by the end of the decade Florida prisons had gained national attention, with the New York Times reporting that for every prisoner the FDOC accepted, it had to release one (Malcolm 1989).

The Final Settlement

The prison building program and the accelerated releases finally brought the state into compliance 21 years after Michael Costello’s original complaint. In May 1991, the parties to Costello entered into an agreement with the governor and the state legislature that stipulated four points. The first three concerned the stability, independence, and power of a newly created medical oversight agency (the Correctional Medical Authority [CMA]), and the fourth required that the legislature enact a law to maintain the prison system population at or below design capacity plus one-third.15 Although Sheppard “didn’t have faith in the system,” he had successfully forced the FDOC to stop using tents and wooden facilities and was “satisfied that we had done everything that we could.”

When they said, we will put it in the statute, I said, fine, put it in the statute and when you get it done come back and talk to me, and they did that. I guess I was more hopeful that it would last (Interview, William Sheppard, 21 Feb. 2008).16

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15 In 1986, at the urging of the Special Master, the legislature created the Correctional Medical Authority (CMA) to replace the monitoring functions of the court (Fla. Laws 1986, ch. 86–183). Funded by the state but politically independent, the CMA was staffed by professionals who had the authority to compel the FDOC to fix deficiencies. The CMA also indirectly monitored overcrowding through its oversight of FDOC’s Office of Health Services, which was tasked with certifying housing occupancy.

16 The prison capacity requirement was codified in state law in 1992 (Fla. Stat. §944.023, 1993).
The Special Master’s final report agreed that Dugger’s actions as secretary of the FDOC supported a “conclusion of a good faith effort to comply”:

These actions include not only removal from bed inventory of questionable actual housing units and of certain jail and other beds which did not exist but also the promulgation . . . of criteria by which the Department will determine bed capacity (Special Master’s Report and Recommendation on Case Closure, 9 Oct. 1992, p. 7).

The report further cited that compliance had been “maintained long enough” that future noncompliance was unlikely (p. 49).

On March 30, 1993, after hearing direct assurances of the state’s commitment from Lieutenant Governor Kenneth “Buddy” MacKay and the new Secretary of Corrections, Harry Singletary, Judge Black issued her opinion and order granting final judgment (Costello v. Wainwright 1993). Expressing confidence that the CMA would faithfully monitor health care delivery and act as a “check on unconstitutional levels of overcrowding” (1993:15), Judge Black found it an adequate mechanism to “assure continued compliance with the orders entered” (1993:18). As the future would confirm, however, Sheppard’s reluctance was justified: In 1995, the state legislature modified the prison capacity law to allow for design capacity plus one-half (Fla. Laws 1995, ch. 95–251). Yet his reservation that the state would not maintain safe and adequate housing and medical care for inmates did not foresee the long-term effects of the prison litigation—which were only just becoming clear.

**The Path of Costello: Policy Feedback and Future Prison Growth**

By 1993, when Costello was finally settled, 50,000 people were incarcerated in Florida’s state prisons—up from just below 20,000 in 1980. In the next 15 years, the state prison population grew by another 50,000 (see Figure 4; FDOC 1981, 1994, 2008). Although unintended and unanticipated, the ways in which Costello was understood in the political arena and translated into social policy had feedback effects that increased the state’s capacity and willingness to build prisons. In turn, this new capacity and willingness paved the way for the “tough justice” laws of the 1990s, which guaranteed increasing incarceration rates for years to come and the persistence of racial inequality.

First, the decisions that brought the FDOC into compliance in the crucial period from 1987 to 1991 increased the state’s capacity to build going forward. In order to comply with the court order, Dugger took responsibility for “building prisons in the quickest,
least expensive way possible” (Interview, Richard Dugger, former secretary of the FDOC, 22 March 2007). To find the cheapest land on which to build prisons, the FDOC abandoned efforts to put prisons in the southern half of the state, close to the homes of most inmates (FDOC 1990). Instead it ran advertisements in North Florida local newspapers and developed glossy brochures on the economic benefit of prisons for rural communities (Florida Department of Corrections brochure: “Siting of New Correctional Facilities,” 1990). The FDOC then built prisons in the counties that provided free land and ready-made infrastructure. This policy created new incentives for state lawmakers to support prisons. As one North Florida state legislator stated,

Well, [the state] needed a prison and I figured if it was going to be somewhere we ought to get some advantage out of it. . . . [It] was always recognized [as] a good clean industry, no smokestacks, employed a lot of people. [Later] the Chamber [of Commerce] saw it as economic development (Interview, Samuel Bell, former Florida State House Representative, 30 May 2007).

Of the 20 new prisons built between 1987 and 1993, 13 were located in North Florida, five in Central Florida, and only two in South Florida.

In order to build cheaply, the FDOC also abandoned ongoing efforts to expand smaller “community-based” institutions and
instead used in-house architects and engineers to develop a “quick construction,” dormitory-style institution that could be built almost entirely with inmate and staff labor (FDOC 1988). In the early 1990s, the FDOC improved its inmate-built prison prototype, making it even faster to build, and more secure (Rhine 1998). The litigation and dynamic release policies also forced the FDOC and the state to create internal mechanisms that strengthened policy makers’ capacity to enhance criminal sentences in the future, including a nonpartisan statutory system to predict prison populations and an in-house corrections data processing system to calculate inmate release dates.

Second, the decision to comply with Costello through early releases and prison growth had feedback effects that reduced the perceived costs and increased the political benefits of incarceration as a crime control strategy—resulting in a new willingness to build prisons. In the 1970s and early 1980s, legislators were loath to build prisons for a variety of reasons: some ideological (the state should treat, rather than warehouse), some fiscal (state budget dollars should be spent elsewhere), some political (voters would punish politicians who spent state money on prisoners). But in the late 1980s, these concerns were tempered by the conservative shift in state politics, the perceived financial benefit of prisons for rural communities, and the absence of a negative public response to the building program into the early 1990s. These developments reinforced state legislators’ calculation that they could spend money on prisons (as a trade-off with transportation, education, or health care) without any political cost (Klas 1991). Furthermore, organized interests that could have highlighted the costs of prison growth did not appear. Traditional civil rights organizations, black legislators, and urban Democrats who were concerned about over-incarceration and racial disparities did not enter into the debate because they served constituents who were the most impacted by crime (Burgos 1988; Marques 1988). Thus even in more liberal districts, as long as prisons stayed out of the news (i.e., no more egregious brutality or conditions scandals), legislators did not lose voters’ support by funding prison expansion (Interview, Jon Mills, former Florida State House Representative, 26 April 2007).

The events of the late 1980s also marked the ascent of the political use of crime in Florida. When new sensational crimes occurred, as in the case of Charlie Street, legislators felt compelled to enhance criminal penalties and place further restrictions on who was eligible for gain-time (Fla. Laws 1988, ch. 88–131). However, because they did this while the state was still under court order, they had to continue the early-release program. With fewer people

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17 Similar to the Willie Horton episode and the defeat of Michael Dukakis, Florida state lawmakers still remember the name “Charlie Street” and the lesson that releasing offenders can have negative political consequences.
eligible for early release, the time served by eligible offenders decreased even further, such that by the early 1990s, average time served was less than 35 percent of court-imposed sentences (Task Force for the Review of the Criminal Justice and Corrections Systems 1994:14). The liberal gain-time policies galvanized the law enforcement community, who used the opposition to early release policies to lobby legislators, organize victims’ groups, and provide the media with juicy sound bites (Schoenfeld 2009). In the early 1990s, the perceived public backlash to the release policies created new incentives for lawmakers to expand prison capacity. Thus in 1994, legislators funded another 14,000 prison beds in order to end the early release program (including beds in three private prison facilities). And in 1995, they passed one of the first “truth-in-sentencing” laws in the country, which required all future inmates to serve 85 percent of their court-imposed sentence (Fla. Laws 1995, ch. 95–294).

Since then, having realized both the physical capacity and the political willingness to build prisons, state lawmakers have continually used crime and prison resources to enhance their political capital (Garland 2001; Simon 2007; Wacquant 2009). For example, in 1995, Florida emblematically “reintroduced” chain gangs due to the initiative of State Senator Charlie Crist, who came to be known as “Chain Gang Charlie” and is now the current governor of Florida (Fla. Laws 1995, ch. 95–283). In 1999, Governor Jeb Bush campaigned on the slogan “10-20-LIFE,” promising mandatory sentences for those who carried guns during the commission of a crime (Fla. Laws 1999, ch. 99–12). His initiative passed despite the fact that the violent crime rate in Florida had been decreasing an average of 4 percent per year since 1990 (Florida Department of Law Enforcement 2008: n.p.). Most recently, in response to “the horrendous murders of children like Adam Walsh, Carlie Brucia, Jessica Lunsford, [and] Sarah Lunde,” Governor Crist passed the Anti-Murder Act, which stipulates zero tolerance for probation violators (Florida Governor’s Office 2007: n.p.). Passed

18 In 1988, the legislature replaced administrative gain-time with “provisional credits,” which allowed for up to 90 days to be subtracted from the sentence of eligible inmates when the prison population reached 97.5 percent of capacity. It became so common it was referred to as “computer release” (Interview, Assistant Bureau Chief of Sentence Structure, FDOC, 30 March 2007).

19 The backlash to early releases even impacted national politicians in Florida (Nurse 1993). Congressmen Charles Canady (12th District) and Bill McCollum (8th District), with the support of their respective county sheriffs, introduced the Prison Litigation Relief Act in summer 1993. The Act aimed to “limit judicial interference in the management of the nation’s prisons and jails” (H. R. 2354, introduced in the 103rd Cong.). Their proposed bill was eventually incorporated into the Prison Litigation Reform Act of 1995, which has drastically reduced the number of federal claims filed by prisoners and has conceivably prevented legitimate claims from being heard (Schlanger & Shay 2007).
unanimously by the legislature, the large potential fiscal impact of the law (estimated at more than $20 million per year) was hardly considered by legislators during the committee hearings before its passage.

To accommodate the growth in the prison population that accompanied tough justice laws, the FDOC built an additional 32 institutions between 1995 and 2007 at an average cost per bed of $12,000 to $30,000 (FDOC 1996:13, 2007b). In 2007, Florida spent one in every 11 budget dollars on corrections, a total of $2.7 billion (Pew Center on the States 2008:30). Similar to many other states with oversized prison populations, in 2009 Florida faced a deficit of $2.4 billion and began cutting back on state services (Cave 2009). In addition, if the prison population continues to grow at this pace, the FDOC will need to add another 16,500 beds over the next five years (Pew Center on the States 2008:10).

It is important to note that this growth in incarceration continues to disproportionately impact black Americans and contribute to racial inequality. New crime initiatives, like those passed in the late 1980s, have disparate consequences: For example, of the almost 4,000 inmates currently imprisoned under “10-20-LIFE,” more than 63 percent are black (non-Hispanic) (FDOC 2007a:6). As when the Costello litigation began, the percentage of black inmates in the FDOC is still more than 50 percent, and the ratio of black to white incarceration is approximately 5.5 to 1 (FDOC 2007b:38).

Conclusion and Discussion

The story of prison litigation in the United States presents a paradox: How could legal mobilization aimed at decreasing incarceration and improving prison conditions have been successful, yet contribute to unprecedented levels of incarceration in the long run? This paradox is exemplified in a statement by Simon, the original lawyer for the inmates in Costello, during the hearings for the OSA in 1979:

My own hope is that once the Federal Court enters a non-appealable order we will see the last of the new prisons built in this state. The system will begin to look at other remedies . . . because we know that if the prisons get overcrowded again . . . they will have to begin spending considerable sums of dollars for the construction of prisons. And the legislature for the first time will be forced to make that choice. For that reason, your honor . . . we have signed it (Transcript, hearing on OSA, 23 Oct. 1979; emphasis added).

Yet less than 10 years later, the legislature chose to comply with the order through a massive prison building initiative. As Mills, the
Speaker of the Florida House of Representatives in 1987, later recalled, legislators did not feel like they had a choice:

The corrections situation was unchangeable and immutable and you had to deal with it. *It really . . . wasn’t a discretionary issue*; not dealing with it had . . . public safety consequences. So it wasn’t a matter of joyfully pushing for more funding for corrections. It was a fact of life and a fact of the circumstances of that period of time (Interview, Jon Mills, former Florida State House Representative, 26 April 2007; emphasis added).

The case study of Florida prison litigation suggests that the discrepancy between Simon’s and Mills’s understanding of the state’s options can be explained by considering the congruence and timing of legal translation on both the front and back end and how decisions around legal translation constrained or enabled future possibilities for compliance.

Prisoners’ rights lawyers and activists in the early 1970s were concerned about the overreliance on confinement, the overrepresentation of black Americans in the criminal justice system, and negligible treatment of inmates. Given the historical context, litigating these issues meant translating them into a problem of constitutional “rights” (Scheingold 2004). While reformers’ decarceration goals seem profoundly misplaced in today’s political climate, at that time they were in sync with national criminal justice experts who were promoting the ideal of rehabilitation and a future with fewer prisons (American Friends Service Committee 1971; Blumstein & Cohen 1973). However, the “rights” framing of prison litigation limited the ideation of the problem to the “immediate dangerous conditions” instead of, for example, the overuse of incarceration for low-level offenses.

Had the framework of the initial preliminary injunction required the state to *reduce* the prison population using specific measures designed to permanently decrease commitments to prison, the idea of regulating “prison capacity” may not have taken on such central importance. As it was, the capacity framework guided negotiations over a consent decree. Similarly, the injunction left space for FDOC administrators, as the “target population,” to interpret the court’s decision based on their own needs and understandings (Horowitz 1977). In their view, the court order was an opportunity to finally extract sufficient resources from the state. Yet during the first part of the 1980s legislators opposed spending more money on corrections, so instead they attempted to reduce the prison population through sentencing reform. In addition, legislators opted to regulate immediate overcrowding crises, as defined by Costello, by releasing inmates before the end of their sentences.

Together, the 1983 reforms offered the best chance for compliance along the terms envisioned by Simon and other prisoners’
rights attorneys. However, the reforms were stymied because legislators did not create new infrastructure or incentives to force district attorneys and judges to utilize alternatives to state prison. In addition, because of the timing of court intervention, the reforms were given less than two years to work. As a consequence, the prison system remained overcrowded and the FDOC was forced to create temporary housing. The attorney for the inmates used the potential danger of temporary housing to uncover the state’s unwillingness to enact permanent remedies, prompting the court to increase its monitoring of the prison system.

Having already “experimented” with reform, state officials were left with two options that could guarantee a long-term solution to overcrowding: release offenders, or build more prisons. Timed with the beginning of the first Republican administration in 20 years and the crack cocaine scare, releasing offenders became politically untenable—thus legislators’ belief that building prisons was their only option. Yet increased drug offense enforcement forced the FDOC to continue to grant accelerated gain-time to inmates in order to stabilize the prison population. The governor, law enforcement, and the media all used the “early releases” for strategic advantage, conflating the legislative release mechanism with the court order to end overcrowding and reinforcing the notion that Costello required the state to build new prisons.

As historical institutionalist scholarship suggests, the case study of Florida prison litigation highlights how the contingencies of timing can affect the court’s ability to bring about social change. The temporal separation between the translation of a problem into a lawsuit on the front end and the translation of the court order into public policy on the back end creates the possibility that legal outcomes will diverge from legal activists’ original intentions. Even when a court order favors the aggrieved party and aims to reduce inequality or remedy injustice, the process by which it is translated over time, with all its contingencies, can produce “compliance” that is unintended or unfavorable.20 Thus scholars of law and social change should consider the ongoing political and historical contexts “in which courts do their work” (Paris 2001), from the initial interpretation of the legal issues at stake, to the legal remedy, to compliance efforts by responsible parties.

The case of Florida prison litigation also points to limits of traditional grassroots mobilization in expanding the progressive possibilities of court decisions. Although a grassroots prison reform

20 Others have made the argument that civil rights litigation, and in particular *Brown v. Board of Education* (1954), did not ultimately bring about the racial equality that plaintiffs envisioned (Bell 2004). One can argue that in *Brown*, the meaning of “compliance” was formally rewritten by the Court as the political context changed, rendering “compliance” insufficient to achieve educational equality.
movement did not exist in Florida during the Costello litigation, it seems unlikely that it could have focused the translation of compliance toward reducing incarceration in the long run. Traditional civil rights organizations did not see it in their interest to advocate on behalf of criminal offenders. And even if they had, in the 1970s civil rights organizations were marginalized in Florida state politics. Most important, inmates’ lawyers could not have predicted the mobilization of law enforcement, and victims’ groups in support of incarceration. With the advantage of hindsight and unlimited resources, inmates’ lawyers could have countered this mobilization by organizing educators and public welfare activists to maintain political support for the 1983 reforms.

In addition, the case of prison litigation in Florida highlights the role of policy feedback in the long-term evaluation of social change efforts through the courts. In Florida, the choices made by policy makers around court compliance, including where and how to build prisons, created policy feedback effects that further expanded the coercive capacity of the state and transformed political calculations around crime control. Thus scholarship on law and social change needs to look beyond one-dimensional “measures” of court success (Stryker 2007:74) (such as the implementation of law “on the books” and “on the ground”) and instead follow how legal translation generates new constituencies, molds new languages of contention, and constrains and enables the definition of new “problems.”

The framework of policy feedback can also help researchers better understand some features of the “law-and-order” politics of the 1990s. By translating the court order into a statutory release mechanism, legislators effectively increased the discrepancy between nominal and actual prison sentence lengths. In turn, this discrepancy created a potent symbol for politicians and interest groups looking to capitalize on the public’s distrust of the state (Zimring et al. 2001). While there may have been valid reasons to shorten prison sentences, politicians in the early 1990s could claim that the “forced release” of offenders before the end of their “true” sentences was a substantial harm to public safety and a “risk” not worth taking. This claim then reinforced the racialized “fear that government authorities [would] serve the interests of criminals” over law-abiding citizens (Zimring et al. 2001:231). In this sense, while unintentional, the prison conditions litigation created a means by which state legislators and district attorneys could attack judicial discretion, expand mandatory minimums, and abolish sentencing guidelines. The political backlash to “early releases” thus allowed politicians to strengthen their own political authority by building new prisons and enacting new policy meant to keep more criminals behind bars for longer periods of time (Simon 2007).
The finding that prison litigation contributed to mass incarceration in Florida supports the “double-edged” sword scholarship about prison conditions litigation (Feeley & Swearingen 2004:466) and substantiates the concern that “by promoting the comforting idea of the ‘lawful prison,’ the litigation movement may have smoothed the way for ever-harder sentences and criminal policies” (Schlanger 1999:2036, commenting on Feeley & Rubin 1998: note 19). Yet the findings run counter to the idea that prisoner rights litigation engendered a backlash within prisons that drew corrections administrators toward a “custody orientation” (Gottschalk 2006; Irwin 1980; Lynch 2010). To the contrary, Florida prison officials embraced prison conditions litigation, using it as a chance to pry needed resources from the state legislature (see also Carroll 1998). The story of prison litigation in Florida also extends new scholarship that finds counterintuitive explanations for mass incarceration. As Gottschalk (2006) has carefully detailed, we should consider how “not the usual suspects,” but rather women’s rights groups and other “liberal” organizations, contributed to policies of mass incarceration. In this case, concerns about racial justice ultimately helped create incentives to expand the penal state, which now ensnares 1 in 11 black adults (in prison or jail or under probation or parole supervision) (Pew Center on the States 2009:1).

Finally, the story of Florida demonstrates how detailed, in-depth accounts of prison growth in one particular state can offer new theoretical insights to explanations of mass incarceration. As most scholarship on the growth in incarceration has focused on the national level (Beckett 1997; Garland 2001; Murakawa 2005; Simon 2007), scholars of punishment have only begun to examine the unique paths to mass incarceration at the state level (Campbell 2009; Lynch 2010; L. Miller 2008; Page n.d.). I believe that more scholarship in this vein will demonstrate that prison litigation had similarly non-intuitive effects in other states. Future scholarship, therefore, should examine other states’ growth in prison capacity, the state-level politics of punishment, and the specific ways in which race has shaped the penal States of America.

**Methods Appendix**

The data for this article are drawn from a larger case study of prison growth in Florida between 1950 and 2000 (Schoenfeld 2009). The case study incorporated the analysis of a variety of primary data, including archival records, court records, and formal interviews. These sources are supplemented by secondary accounts of Florida’s political history, newspaper articles, and crime and law enforcement data. In addition, my understanding of Florida’s
politics and its prison system was also informed by numerous informal conversations and field visits to a representative sample of Florida’s correctional institutions.

I created a historical record of key decisions concerning Florida’s system of punishment between 1950 and 2000 with archival data from the Florida State Archives and Library, the Florida Legislative Library, the Florida Supreme Court Library, and the FDOC. I reconstructed the Costello case using publicly available court decisions and filings and hearing transcripts, pleadings, correspondence, and monitoring and other reports from the private files of William Sheppard, Esq., in Jacksonville, Florida. Documents referred to in the text are on file with the author.

From the documentary evidence I identified key actors involved in promoting or opposing key legislation and/or administrative changes from a variety of perspectives, including elected state officials, bureaucrats, legal and other activists, and representatives of special interest groups. I reached out to 75 potential interviewees, being careful to include people from each time period, both Republicans and Democrats and people who were less formally involved in the policy process. I was able to conduct 54 formal interviews between March 2007 and September 2009. Where I could not speak directly to key people, I relied on the archival data and newspaper accounts of their positions, statements, and actions. For the most part I was able to conduct interviews in person and digitally record and transcribe them (I asked permission to record interviews and only three people declined). Interviews lasted anywhere from 45 minutes to 2 1/2 hours. Since interviewees are elected or appointed public officials, or lawyers asked about their professional decisions and duties, I was granted an exemption by the IRB to receive oral consent. Where relevant I use interviewees’ real names. The following table lists the number of interviewees by perspective and time period:

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I generated separate interview schedules for each of the 54 interviewees depending on the time period, the decisions made during the time period, and his or her involvement. In general, I asked interviewees about their role in the decisionmaking process, their goals, their choices, what information they used to guide their decisions, who supported their decisions and opposed their decisions, and their understandings of the consequences of their decisions. I asked interviewees who did not directly make policy decisions about the process by which decisions were made, the information available to decision makers, or other administrative processes. As interviewees were often speaking of events that happened years in the past, my detailed questions helped jog their memories. When their answers conflicted or were circumspect, I triangulated the information with available documentary evidence or newspaper articles from the time.

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This case arises from serious constitutional violations in California’s prison system. The violations have persisted for years. They remain uncorrected. The appeal comes to this Court from a three-judge District Court order directing California to remedy two ongoing violations of the Cruel and Unusual Punishments Clause, a guarantee binding on the States by the Due Process Clause of the Fourteenth Amendment. The violations are the subject of two class actions in two Federal District Courts. The first involves the class of prisoners with serious mental disorders. That case is Coleman v. Brown. The second involves prisoners with serious medical conditions. That case is Plata v. Brown. The order of the three-judge District Court is applicable to both cases.

After years of litigation, it became apparent that a remedy for the constitutional violations would not be effective absent a reduction in the prison system population. The authority to order release of prisoners as a remedy to cure a systemic violation of the Eighth Amendment is a power reserved to a three-judge district court, not a single-judge district court. In accordance with that rule, the Coleman and Plata District Judges independently requested that a three-judge court be convened. The Chief Judge of the Court of Appeals for the Ninth Circuit convened a three-judge court composed of the Coleman and Plata District Judges and a third, Ninth Circuit Judge. Because the two cases are interrelated, their limited consolidation for this purpose has a certain utility in avoiding conflicting decrees and aiding judicial consideration and enforcement. The State in this Court has not objected to consolidation, although the State does argue that the three-judge court was prematurely convened. The State also objects to the substance of the three-judge court order, which requires the State to reduce overcrowding in its prisons.

The appeal presents the question whether the remedial order issued by the three-judge court is consistent with requirements and procedures set forth in a congressional statute, the Prison Litigation Reform Act
of 1995 (PLRA). The order leaves the choice of means to reduce overcrowding to the discretion of state officials. But absent compliance through new construction, out-of-state transfers, or other means—or modification of the order upon a further showing by the State—the State will be required to release some number of prisoners before their full sentences have been served. High recidivism rates must serve as a warning that mistaken or premature release of even one prisoner can cause injury and harm. The release of prisoners in large numbers—assuming the State finds no other way to comply with the order—is a matter of undoubted, grave concern.

At the time of trial, California’s correctional facilities held some 156,000 persons. This is nearly double the number that California’s prisons were designed to hold, and California has been ordered to reduce its prison population to 137.5% of design capacity. By the three-judge court’s own estimate, the required population reduction could be as high as 46,000 persons. Although the State has reduced the population by at least 9,000 persons during the pendency of this appeal, this means a further reduction of 37,000 persons could be required. As will be noted, the reduction need not be accomplished in an indiscriminate manner or in these substantial numbers if satisfactory, alternate remedies or means for compliance are devised. The State may employ measures, including good-time credits and diversion of low-risk offenders and technical parole violators to community-based programs, that will mitigate the order’s impact. The population reduction potentially required is nevertheless of unprecedented sweep and extent.

Yet so too is the continuing injury and harm resulting from these serious constitutional violations. For years the medical and mental health care provided by California’s prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners’ basic health needs. Needless suffering and death have been the well-documented result. Over the whole course of years during which this litigation has been pending, no other remedies have been found to be sufficient. Efforts to remedy the violation have been frustrated by severe overcrowding in California’s prison system. Short term gains in the provision of care have been eroded by the long-term effects of severe and pervasive overcrowding.

Overcrowding has overtaken the limited resources of prison staff; imposed demands well beyond the capacity of medical and mental health facilities; and created unsanitary and unsafe conditions that make progress in the provision of care difficult or impossible to achieve. The overcrowding is the “primary cause of the violation of a Federal right,” specifically the severe and unlawful mistreatment of prisoners through grossly inadequate provision of medical and mental health care.

This Court now holds that the PLRA does authorize the relief afforded in this case and that the court-mandated population limit is necessary to remedy the violation of prisoners’ constitutional rights. The order of the three-judge court, subject to the right of the State to seek its modification in appropriate circumstances, must be affirmed.
The degree of overcrowding in California’s prisons is exceptional. California’s prisons are designed to house a population just under 80,000, but at the time of the three-judge court’s decision the population was almost double that. The State’s prisons had operated at around 200% of design capacity for at least 11 years. Prisoners are crammed into spaces neither designed nor intended to house inmates. As many as 200 prisoners may live in a gymnasium, monitored by as few as two or three correctional officers. As many as 54 prisoners may share a single toilet.

The Corrections Independent Review Panel, a body appointed by the Governor and composed of correctional consultants and representatives from state agencies, concluded that California’s prisons are “‘severely overcrowded, imperiling the safety of both correctional employees and inmates.’” In 2006, then-Governor Schwarzenegger declared a state of emergency in the prisons, as “‘immediate action is necessary to prevent death and harm caused by California’s severe prison overcrowding.’” The consequences of overcrowding identified by the Governor include “‘increased, substantial risk for transmission of infectious illness’” and a suicide rate “‘approaching an average of one per week.’”

Prisoners in California with serious mental illness do not receive minimal, adequate care. Because of a shortage of treatment beds, suicidal inmates may be held for prolonged periods in telephone-booth sized cages without toilets. A psychiatric expert reported observing an inmate who had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic. Prison officials explained they had “‘no place to put him.’” Other inmates awaiting care may be held for months in administrative segregation, where they endure harsh and isolated conditions and receive only limited mental health services. Wait times for mental health care range as high as 12 months. In 2006, the suicide rate in California’s prisons was nearly 80% higher than the national average for prison populations; and a court-appointed Special Master found that 72.1% of suicides involved “some measure of inadequate assessment, treatment, or intervention, and were therefore most probably foreseeable and/or preventable.”

Prisoners suffering from physical illness also receive severely deficient care. California’s prisons were designed to meet the medical needs of a population at 100% of design capacity and so have only half the clinical space needed to treat the current population. A correctional officer testified that, in one prison, up to 50 sick inmates may be held together in a 12–by 20–foot cage for up to five hours awaiting treatment. The number of staff is inadequate, and prisoners face significant delays in access to care. A prisoner with severe abdominal pain died after a 5–week delay in referral to a specialist; a prisoner with “constant and extreme” chest pain died after an 8–hour delay in evaluation by a doctor; and a prisoner died of testicular cancer after a “failure of MDs to work up for cancer in a young man with 17 months of testicular pain.” Doctor Ronald Shansky, former medical director of the Illinois state prison system, surveyed death reviews for California prisoners. He concluded that extreme departures from the standard of care were “widespread,” and that the proportion of “possibly preventable or preventable” deaths was “extremely high.” Many more prisoners, suffering from severe but not life-threatening conditions, experience prolonged illness and unnecessary pain.
These conditions are the subject of two federal cases. The first to commence, Coleman v. Brown, was filed in 1990. Coleman involves the class of seriously mentally ill persons in California prisons. Over 15 years ago, in 1995, after a 39–day trial, the Coleman District Court found “overwhelming evidence of the systematic failure to deliver necessary care to mentally ill inmates” in California prisons. The prisons were “seriously and chronically understaffed,” and had “no effective method for ensuring ... the competence of their staff,” The prisons had failed to implement necessary suicide-prevention procedures, “due in large measure to the severe understaffing.” Mentally ill inmates “languished for months, or even years, without access to necessary care.” “They suffer from severe hallucinations, [and] they decompensate into catatonic states.” The court appointed a Special Master to oversee development and implementation of a remedial plan of action.

In 2007, 12 years after his appointment, the Special Master in Coleman filed a report stating that, after years of slow improvement, the state of mental health care in California’s prisons was deteriorating. The Special Master ascribed this change to increased overcrowding. The rise in population had led to greater demand for care, and existing programming space and staffing levels were inadequate to keep pace. Prisons had retained more mental health staff, but the “growth of the resource [had] not matched the rise in demand.” At the very time the need for space was rising, the need to house the expanding population had also caused a “reduction of programming space now occupied by inmate bunks.” The State was “facing a four to five-year gap in the availability of sufficient beds to meet the treatment needs of many inmates/patients.” “[I]ncreasing numbers of truly psychotic inmate/patients are trapped in [lower levels of treatment] that cannot meet their needs." The Special Master concluded that many early “achievements have succumbed to the inexorably rising tide of population, leaving behind growing frustration and despair.”

The second action, Plata v. Brown, involves the class of state prisoners with serious medical conditions. After this action commenced in 2001, the State conceded that deficiencies in prison medical care violated prisoners’ Eighth Amendment rights. The State stipulated to a remedial injunction. The State failed to comply with that injunction, and in 2005 the court appointed a Receiver to oversee remedial efforts. The court found that “the California prison medical care system is broken beyond repair,” resulting in an “unconscionable degree of suffering and death.” The court found: “[I]t is an uncontested fact that, on average, an inmate in one of California’s prisons needlessly dies every six to seven days due to constitutional deficiencies in the [California prisons’] medical delivery system.” And the court made findings regarding specific instances of neglect, including the following:

“[A] San Quentin prisoner with hypertension, diabetes and renal failure was prescribed two different medications that actually served to exacerbate his renal failure. An optometrist noted the patient’s
retinal bleeding due to very high blood pressure and referred him for immediate evaluation, but this
evaluation never took place. It was not until a year later that the patient’s renal failure was recognized,
at which point he was referred to a nephrologist on an urgent basis; he should have been seen by the
specialist within 14 days but the consultation never happened and the patient died three months later.”

Prisons were unable to retain sufficient numbers of competent medical staff, and would “hire any doctor
who had ‘a license, a pulse and a pair of shoes.’” Medical facilities lacked “necessary medical
equipment” and did “not meet basic sanitation standards.” “Exam tables and counter tops, where
prisoners with ... communicable diseases are treated, [were] not routinely disinfected.”

In 2008, three years after the District Court’s decision, the Receiver described continuing deficiencies in
the health care provided by California prisons:

“Timely access is not assured. The number of medical personnel has been inadequate, and competence
has not been assured .... Adequate housing for the disabled and aged does not exist. The medical
facilities, when they exist at all, are in an abysmal state of disrepair. Basic medical equipment is often
not available or used. Medications and other treatment options are too often not available when
needed .... Indeed, it is a misnomer to call the existing chaos a ‘medical delivery system’—it is more
an act of desperation than a system.”

A report by the Receiver detailed the impact of overcrowding on efforts to remedy the violation. The
Receiver explained that “overcrowding, combined with staffing shortages, has created a culture of
cynicism, fear, and despair which makes hiring and retaining competent clinicians extremely difficult.”
“[O]vercrowding, and the resulting day to day operational chaos of the [prison system], creates regular
‘crisis’ situations which ... take time [and] energy ... away from important remedial programs.”
Overcrowding had increased the incidence of infectious disease, and had led to rising prison violence
and greater reliance by custodial staff on lock downs, which “inhibit the delivery of medical care and
increase the staffing necessary for such care.” “Every day,” the Receiver reported, “California prison
wardens and health care managers make the difficult decision as to which of the class actions,
Coleman ... or Plata they will fail to comply with because of staff shortages and patient loads.”

D

The Coleman and Plata plaintiffs, believing that a remedy for unconstitutional medical and mental
health care could not be achieved without reducing overcrowding, moved their respective District Courts
to convene a three-judge court empowered under the PLRA to order reductions in the prison population.
The judges in both actions granted the request, and the cases were consolidated before a single three-
judge court. The State has not challenged the validity of the consolidation in proceedings before this
Court, so its propriety is not presented by this appeal.

The three-judge court heard 14 days of testimony and issued a 184–page opinion, making extensive
findings of fact. The court ordered California to reduce its prison population to 137.5% of the prisons’
design capacity within two years. Assuming the State does not increase capacity through new construction, the order requires a population reduction of 38,000 to 46,000 persons. Because it appears all but certain that the State cannot complete sufficient construction to comply fully with the order, the prison population will have to be reduced to at least some extent. The court did not order the State to achieve this reduction in any particular manner. Instead, the court ordered the State to formulate a plan for compliance and submit its plan for approval by the court.

The State appealed to this Court pursuant to 28 U.S.C. § 1253, and the Court postponed consideration of the question of jurisdiction to the hearing on the merits.

II

As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. “ ‘The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.’ ”

To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison’s failure to provide sustenance for inmates “may actually produce physical ‘torture or a lingering death.’ ” Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.

If government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation. Courts must be sensitive to the State’s interest in punishment, deterrence, and rehabilitation, as well as the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals. Courts nevertheless must not shrink from their obligation to “enforce the constitutional rights of all ‘persons,’ including prisoners.” Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.

Courts faced with the sensitive task of remedying unconstitutional prison conditions must consider a range of available options, including appointment of special masters or receivers and the possibility of consent decrees. When necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison’s population. By its terms, the PLRA restricts the circumstances in which a court may enter an order “that has the purpose or effect of reducing or limiting the prison population.” The order in this case does not necessarily require the State to release any prisoners. The State may comply by raising the design capacity of its prisons or by transferring prisoners to county facilities or facilities in other States. Because the order limits the prison population as a percentage of
design capacity, it nonetheless has the “effect of reducing or limiting the prison population.”

Under the PLRA, only a three-judge court may enter an order limiting a prison population. Before a three-judge court may be convened, a district court first must have entered an order for less intrusive relief that failed to remedy the constitutional violation and must have given the defendant a reasonable time to comply with its prior orders. The party requesting a three-judge court must then submit “materials sufficient to demonstrate that [these requirements] have been met.” If the district court concludes that the materials are, in fact, sufficient, a three-judge court may be convened.

The three-judge court must then find by clear and convincing evidence that “crowding is the primary cause of the violation of a Federal right” and that “no other relief will remedy the violation of the Federal right.” As with any award of prospective relief under the PLRA, the relief “shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs.” The three-judge court must therefore find that the relief is “narrowly drawn, extends no further than necessary . . ., and is the least intrusive means necessary to correct the violation of the Federal right.” In making this determination, the three-judge court must give “substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.” Applying these standards, the three-judge court found a population limit appropriate, necessary, and authorized in this case.

This Court’s review of the three-judge court’s legal determinations is *de novo*, but factual findings are reviewed for clear error. . . . The three-judge court oversaw two weeks of trial and heard at considerable length from California prison officials, as well as experts in the field of correctional administration. . . .

A

The State contends that it was error to convene the three-judge court without affording it more time to comply with the prior orders in *Coleman* and *Plata*.

. . .

2

Before a three-judge court may be convened to consider whether to enter a population limit, the PLRA requires that the court have “previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied.” This provision refers to “an order.” It is satisfied if the court has entered one order, and this single order has “failed to remedy” the constitutional violation. The defendant must also have had “a reasonable amount of time to comply with the previous court orders.” This provision refers to the court’s “orders.” It requires that the defendant have been given a reasonable time to comply with all of the court’s orders. Together, these requirements ensure that the “‘last resort remedy’ ” of a population limit is not imposed “‘as a first step.’ ”
The first of these conditions, the previous order requirement of § 3626(a)(3)(A)(i), was satisfied in Coleman by appointment of a Special Master in 1995, and it was satisfied in Plata by approval of a consent decree and stipulated injunction in 2002. Both orders were intended to remedy the constitutional violations. Both were given ample time to succeed. When the three-judge court was convened, 12 years had passed since the appointment of the Coleman Special Master, and 5 years had passed since the approval of the Plata consent decree. The State does not claim that either order achieved a remedy. Although the PLRA entitles a State to terminate remedial orders such as these after two years unless the district court finds that the relief “remains necessary to correct a current and ongoing violation of the Federal right,” California has not attempted to obtain relief on this basis.

The State claims instead that the second condition, the reasonable time requirement of § 3626(a)(3)(A)(ii), was not met because other, later remedial efforts should have been given more time to succeed. In 2006, the Coleman District Judge approved a revised plan of action calling for construction of new facilities, hiring of new staff, and implementation of new procedures. That same year, the Plata District Judge selected and appointed a Receiver to oversee the State’s ongoing remedial efforts. When the three-judge court was convened, the Receiver had filed a preliminary plan of action calling for new construction, hiring of additional staff, and other procedural reforms.

Although both the revised plan of action in Coleman and the appointment of the Receiver in Plata were new developments in the courts’ remedial efforts, the basic plan to solve the crisis through construction, hiring, and procedural reforms remained unchanged. These efforts had been ongoing for years; the failed consent decree in Plata had called for implementation of new procedures and hiring of additional staff; and the Coleman Special Master had issued over 70 orders directed at achieving a remedy through construction, hiring, and procedural reforms. The Coleman Special Master and Plata Receiver were unable to provide assurance that further, substantially similar efforts would yield success absent a population reduction. Instead, the Coleman Special Master explained that “many of the clinical advances ... painfully accomplished over the past decade are slip-sliding away” as a result of overcrowding. And the Plata Receiver indicated that, absent a reduction in overcrowding, a successful remedial effort could “all but bankrupt” the State of California.

Having engaged in remedial efforts for 5 years in Plata and 12 in Coleman, the District Courts were not required to wait to see whether their more recent efforts would yield equal disappointment. When a court attempts to remedy an entrenched constitutional violation through reform of a complex institution, such as this statewide prison system, it may be necessary in the ordinary course to issue multiple orders directing and adjusting ongoing remedial efforts. Each new order must be given a reasonable time to succeed, but reasonableness must be assessed in light of the entire history of the court’s remedial efforts. A contrary reading of the reasonable time requirement would in effect require district courts to impose a moratorium on new remedial orders before issuing a population limit. This unnecessary period of inaction would delay an eventual remedy and would prolong the courts’ involvement, serving neither the State nor the prisoners. Congress did not require this unreasonable result when it used the term “reasonable.”
The *Coleman* and *Plata* courts had a solid basis to doubt that additional efforts to build new facilities and hire new staff would achieve a remedy. Indeed, although 5 years have now passed since the appointment of the *Plata* Receiver and approval of the revised plan of action in *Coleman,* there is no indication that the constitutional violations have been cured. A report filed by the *Coleman* Special Master in July 2009 describes ongoing violations, including an “absence of timely access to appropriate levels of care at every point in the system.” A report filed by the *Plata* Receiver in October 2010 likewise describes ongoing deficiencies in the provision of medical care and concludes that there are simply “too many prisoners for the healthcare infrastructure.” The *Coleman* and *Plata* courts acted reasonably when they convened a three-judge court without further delay.

B

Once a three-judge court has been convened, the court must find additional requirements satisfied before it may impose a population limit. The first of these requirements is that “crowding is the primary cause of the violation of a Federal right.”

1

The three-judge court found the primary cause requirement satisfied by the evidence at trial. The court found that overcrowding strains inadequate medical and mental health facilities; overburdens limited clinical and custodial staff; and creates violent, unsanitary, and chaotic conditions that contribute to the constitutional violations and frustrate efforts to fashion a remedy. The three-judge court also found that “until the problem of overcrowding is overcome it will be impossible to provide constitutionally compliant care to California’s prison population.”

The record documents the severe impact of burgeoning demand on the provision of care. At the time of trial, vacancy rates for medical and mental health staff ranged as high as 20% for surgeons, 25% for physicians, 39% for nurse practitioners, and 54.1% for psychiatrists. These percentages are based on the number of positions budgeted by the State. Dr. Ronald Shansky, former medical director of the Illinois prison system, concluded that these numbers understate the severity of the crisis because the State has not budgeted sufficient staff to meet demand. According to Dr. Shansky, “even if the prisons were able to fill all of their vacant health care positions, which they have not been able to do to date, ... the prisons would still be unable to handle the level of need given the current overcrowding.” Dr. Craig Haney, a professor of psychology, reported that mental health staff are “managing far larger caseloads than is appropriate or effective.” A prison psychiatrist told Dr. Haney that “we are doing about 50% of what we should be doing.” In the context of physical care Dr. Shansky agreed that “demand for care, particularly for the high priority cases, continues to overwhelm the resources available.”
Even on the assumption that vacant positions could be filled, the evidence suggested there would be insufficient space for the necessary additional staff to perform their jobs. The Plata Receiver, in his report on overcrowding, concluded that even the “newest and most modern prisons” had been “designed with clinic space which is only one-half that necessary for the real-life capacity of the prisons.” Dr. Haney reported that “[e]ach one of the facilities I toured was short of significant amounts of space needed to perform otherwise critical tasks and responsibilities.” In one facility, staff cared for 7,525 prisoners in space designed for one-third as many. Staff operate out of converted storage rooms, closets, bathrooms, shower rooms, and visiting centers. These makeshift facilities impede the effective delivery of care and place the safety of medical professionals in jeopardy, compounding the difficulty of hiring additional staff.

This shortfall of resources relative to demand contributes to significant delays in treatment. Mentally ill prisoners are housed in administrative segregation while awaiting transfer to scarce mental health treatment beds for appropriate care. One correctional officer indicated that he had kept mentally ill prisoners in segregation for “ ‘6 months or more.’ ” Other prisoners awaiting care are held in tiny, phone-booth sized cages. The record documents instances of prisoners committing suicide while awaiting treatment.

Delays are no less severe in the context of physical care. Prisons have backlogs of up to 700 prisoners waiting to see a doctor. A review of referrals for urgent specialty care at one prison revealed that only 105 of 316 pending referrals had a scheduled appointment, and only 2 had an appointment scheduled to occur within 14 days. Urgent specialty referrals at one prison had been pending for six months to a year.

Crowding also creates unsafe and unsanitary living conditions that hamper effective delivery of medical and mental health care. A medical expert described living quarters in converted gymnasiums or dayrooms, where large numbers of prisoners may share just a few toilets and showers, as “ ‘breeding grounds for disease.’ ” Cramped conditions promote unrest and violence, making it difficult for prison officials to monitor and control the prison population. On any given day, prisoners in the general prison population may become ill, thus entering the plaintiff class; and overcrowding may prevent immediate medical attention necessary to avoid suffering, death, or spread of disease. After one prisoner was assaulted in a crowded gymnasium, prison staff did not even learn of the injury until the prisoner had been dead for several hours. Living in crowded, unsafe, and unsanitary conditions can cause prisoners with latent mental illnesses to worsen and develop overt symptoms. Crowding may also impede efforts to improve delivery of care. Two prisoners committed suicide by hanging after being placed in cells that had been identified as requiring a simple fix to remove attachment points that could support a noose. The repair was not made because doing so would involve removing prisoners from the cells, and there was no place to put them. More generally, Jeanne Woodford, the former acting secretary of California’s prisons, testified that there “ ‘are simply too many issues that arise from such a large number of prisoners,’ ” and that, as a result, “ ‘management spends virtually all of its time fighting fires instead of engaging in thoughtful decision-making and planning’ ” of the sort needed to fashion an effective remedy for these constitutional violations.
Increased violence also requires increased reliance on lockdowns to keep order, and lockdowns further impede the effective delivery of care. In 2006, prison officials instituted 449 lockdowns. The average lockdown lasted 12 days, and 20 lockdowns lasted 60 days or longer. During lockdowns, staff must either escort prisoners to medical facilities or bring medical staff to the prisoners. Either procedure puts additional strain on already overburdened medical and custodial staff. Some programming for the mentally ill even may be canceled altogether during lockdowns, and staff may be unable to supervise the delivery of psychotropic medications.

The effects of overcrowding are particularly acute in the prisons’ reception centers, intake areas that process 140,000 new or returning prisoners every year. Crowding in these areas runs as high as 300% of design capacity. Living conditions are “‘toxic,’ ” and a lack of treatment space impedes efforts to identify inmate medical or mental health needs and provide even rudimentary care. The former warden of San Quentin reported that doctors in that prison’s reception center “‘were unable to keep up with physicals or provid[e] any kind of chronic care follow-up.’” Inmates spend long periods of time in these areas awaiting transfer to the general population. Some prisoners are held in the reception centers for their entire period of incarceration.

Numerous experts testified that crowding is the primary cause of the constitutional violations. The former warden of San Quentin and former acting secretary of the California prisons concluded that crowding “makes it ‘virtually impossible for the organization to develop, much less implement, a plan to provide prisoners with adequate care.’” The former executive director of the Texas Department of Criminal Justice testified that “‘[e]verything revolves around overcrowding’” and that “‘overcrowding is the primary cause of the medical and mental health care violations.’” The former head of corrections in Pennsylvania, Washington, and Maine testified that overcrowding is “‘overwhelming the system both in terms of sheer numbers, in terms of the space available, in terms of providing healthcare.’” And the current secretary of the Pennsylvania Department of Corrections testified that “‘the biggest inhibiting factor right now in California being able to deliver appropriate mental health and medical care is the severe overcrowding.’”

The State attempts to undermine the substantial evidence presented at trial, and the three-judge court’s findings of fact, by complaining that the three-judge court did not allow it to present evidence of current prison conditions. This suggestion lacks a factual basis.

The three-judge court properly admitted evidence of current conditions as relevant to the issues before it. The three-judge court allowed discovery until a few months before trial; expert witnesses based their conclusions on recent observations of prison conditions; the court admitted recent reports on prison conditions by the Plata Receiver and Coleman Special Master; and both parties presented testimony related to current conditions, including understaffing, inadequate facilities, and unsanitary and unsafe
living conditions.

The State does not point to any significant evidence that it was unable to present and that would have changed the outcome of the proceedings. To the contrary, the record and opinion make clear that the decision of the three-judge court was based on current evidence pertaining to ongoing constitutional violations.

C

The three-judge court was also required to find by clear and convincing evidence that “no other relief will remedy the violation of the Federal right.” § 3626(a)(3)(E)(ii).

The State argues that the violation could have been remedied through a combination of new construction, transfers of prisoners out of State, hiring of medical personnel, and continued efforts by the Plata Receiver and Coleman Special Master. The order in fact permits the State to comply with the population limit by transferring prisoners to county facilities or facilities in other States, or by constructing new facilities to raise the prisons’ design capacity. And the three-judge court’s order does not bar the State from undertaking any other remedial efforts. If the State does find an adequate remedy other than a population limit, it may seek modification or termination of the three-judge court’s order on that basis. The evidence at trial, however, supports the three-judge court’s conclusion that an order limited to other remedies would not provide effective relief.

The State’s argument that out-of-state transfers provide a less restrictive alternative to a population limit must fail because requiring out-of-state transfers itself qualifies as a population limit under the PLRA. Such an order “has the purpose or effect of reducing or limiting the prison population, or ... directs the release from or nonadmission of prisoners to a prison.” The same is true of transfers to county facilities. Transfers provide a means to reduce the prison population in compliance with the three-judge court’s order. They are not a less restrictive alternative to that order.

Even if out-of-state transfers could be regarded as a less restrictive alternative, the three-judge court found no evidence of plans for transfers in numbers sufficient to relieve overcrowding. The State complains that the Coleman District Court slowed the rate of transfer by requiring inspections to assure that the receiving institutions were in compliance with the Eighth Amendment, but the State has made no effort to show that it has the resources and the capacity to transfer significantly larger numbers of prisoners absent that condition.

Construction of new facilities, in theory, could alleviate overcrowding, but the three-judge court found no realistic possibility that California would be able to build itself out of this crisis. At the time of the court’s decision the State had plans to build new medical and housing facilities, but funding for some plans had not been secured and funding for other plans had been delayed by the legislature for years.
Particularly in light of California’s ongoing fiscal crisis, the three-judge court deemed “chimerical” any “remedy that requires significant additional spending by the state.” Events subsequent to the three-judge court’s decision have confirmed this conclusion. In October 2010, the State notified the Coleman District Court that a substantial component of its construction plans had been delayed indefinitely by the legislature. And even if planned construction were to be completed, the Plata Receiver found that many so-called “expansion” plans called for cramming more prisoners into existing prisons without expanding administrative and support facilities. The former acting secretary of the California prisons explained that these plans would “‘compound the burdens imposed on prison administrators and line staff’ ” by adding to the already overwhelming prison population, creating new barriers to achievement of a remedy.

The three-judge court also rejected additional hiring as a realistic means to achieve a remedy. The State for years had been unable to fill positions necessary for the adequate provision of medical and mental health care, and the three-judge court found no reason to expect a change. Although the State points to limited gains in staffing between 2007 and 2008, the record shows that the prison system remained chronically understaffed through trial in 2008. The three-judge court found that violence and other negative conditions caused by crowding made it difficult to hire and retain needed staff. The court also concluded that there would be insufficient space for additional staff to work even if adequate personnel could somehow be retained. Additional staff cannot help to remedy the violation if they have no space in which to see and treat patients.

The State claims that, even if each of these measures were unlikely to remedy the violation, they would succeed in doing so if combined together. Aside from asserting this proposition, the State offers no reason to believe it is so. Attempts to remedy the violations in Plata have been ongoing for 9 years. In Coleman, remedial efforts have been ongoing for 16. At one time, it may have been possible to hope that these violations would be cured without a reduction in overcrowding. A long history of failed remedial orders, together with substantial evidence of overcrowding’s deleterious effects on the provision of care, compels a different conclusion today.

The common thread connecting the State’s proposed remedial efforts is that they would require the State to expend large amounts of money absent a reduction in overcrowding. The Court cannot ignore the political and fiscal reality behind this case. California’s Legislature has not been willing or able to allocate the resources necessary to meet this crisis absent a reduction in overcrowding. There is no reason to believe it will begin to do so now, when the State of California is facing an unprecedented budgetary shortfall. As noted above, the legislature recently failed to allocate funds for planned new construction. Without a reduction in overcrowding, there will be no efficacious remedy for the unconstitutional care of the sick and mentally ill in California’s prisons.
D

The PLRA states that no prospective relief shall issue with respect to prison conditions unless it is narrowly drawn, extends no further than necessary to correct the violation of a federal right, and is the least intrusive means necessary to correct the violation. When determining whether these requirements are met, courts must “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system.”

I

The three-judge court acknowledged that its order “is likely to affect inmates without medical conditions or serious mental illness.” This is because reducing California’s prison population will require reducing the number of prisoners outside the class through steps such as parole reform, sentencing reform, use of good-time credits, or other means to be determined by the State. Reducing overcrowding will also have positive effects beyond facilitating timely and adequate access to medical care, including reducing the incidence of prison violence and ameliorating unsafe living conditions. According to the State, these collateral consequences are evidence that the order sweeps more broadly than necessary.

The population limit imposed by the three-judge court does not fail narrow tailoring simply because it will have positive effects beyond the plaintiff class. Narrow tailoring requires a “‘fit’ between the [remedy’s] ends and the means chosen to accomplish those ends.” The scope of the remedy must be proportional to the scope of the violation, and the order must extend no further than necessary to remedy the violation. This Court has rejected remedial orders that unnecessarily reach out to improve prison conditions other than those that violate the Constitution. But the precedents do not suggest that a narrow and otherwise proper remedy for a constitutional violation is invalid simply because it will have collateral effects.

Nor does anything in the text of the PLRA require that result. The PLRA states that a remedy shall extend no further than necessary to remedy the violation of the rights of a “particular plaintiff or plaintiffs.” This means only that the scope of the order must be determined with reference to the constitutional violations established by the specific plaintiffs before the court.

This case is unlike cases where courts have impermissibly reached out to control the treatment of persons or institutions beyond the scope of the violation. Even prisoners with no present physical or mental illness may become afflicted, and all prisoners in California are at risk so long as the State continues to provide inadequate care. Prisoners in the general population will become sick, and will become members of the plaintiff classes, with routine frequency; and overcrowding may prevent the timely diagnosis and care necessary to provide effective treatment and to prevent further spread of disease. Relief targeted only at present members of the plaintiff classes may therefore fail to adequately protect future class members who will develop serious physical or mental illness. Prisoners who are not sick or mentally ill do not yet have a claim that they have been subjected to care that violates the Eighth
Amendment, but in no sense are they remote bystanders in California’s medical care system. They are that system’s next potential victims.

A release order limited to prisoners within the plaintiff classes would, if anything, unduly limit the ability of State officials to determine which prisoners should be released. . . . The order of the three-judge court gives the State substantial flexibility to determine who should be released. If the State truly believes that a release order limited to sick and mentally ill inmates would be preferable to the order entered by the three-judge court, the State can move the three-judge court for modification of the order on that basis. The State has not requested this relief from this Court.

The order also is not overbroad because it encompasses the entire prison system, rather than separately assessing the need for a population limit at every institution. . . .

Although the three-judge court’s order addresses the entire California prison system, it affords the State flexibility to accommodate differences between institutions. There is no requirement that every facility comply with the 137.5% limit. Assuming no constitutional violation results, some facilities may retain populations in excess of the limit provided other facilities fall sufficiently below it so the system as a whole remains in compliance with the order. This will allow prison officials to shift prisoners to facilities that are better able to accommodate overcrowding, or out of facilities where retaining sufficient medical staff has been difficult. The alternative—a series of institution-specific population limits—would require federal judges to make these choices. Leaving this discretion to state officials does not make the order overbroad.

Nor is the order overbroad because it limits the State’s authority to run its prisons, as the State urges in its brief. While the order does in some respects shape or control the State’s authority in the realm of prison administration, it does so in a manner that leaves much to the State’s discretion. The State may choose how to allocate prisoners between institutions; it may choose whether to increase the prisons’ capacity through construction or reduce the population; and, if it does reduce the population, it may decide what steps to take to achieve the necessary reduction. The order’s limited scope is necessary to remedy a constitutional violation.

. . . .

In reaching its decision, the three-judge court gave “substantial weight” to any potential adverse impact on public safety from its order. The court devoted nearly 10 days of trial to the issue of public safety, and it gave the question extensive attention in its opinion. Ultimately, the court concluded that it would be possible to reduce the prison population “in a manner that preserves public safety and the operation of the criminal justice system.”

The PLRA’s requirement that a court give “substantial weight” to public safety does not require the court
to certify that its order has no possible adverse impact on the public. A contrary reading would depart from the statute’s text by replacing the word “substantial” with “conclusive.” Whenever a court issues an order requiring the State to adjust its incarceration and criminal justice policy, there is a risk that the order will have some adverse impact on public safety in some sectors. This is particularly true when the order requires release of prisoners before their sentence has been served. Persons incarcerated for even one offense may have committed many other crimes prior to arrest and conviction, and some number can be expected to commit further crimes upon release. Yet the PLRA contemplates that courts will retain authority to issue orders necessary to remedy constitutional violations, including authority to issue population limits when necessary. A court is required to consider the public safety consequences of its order and to structure, and monitor, its ruling in a way that mitigates those consequences while still achieving an effective remedy of the constitutional violation.

This inquiry necessarily involves difficult predictive judgments regarding the likely effects of court orders. Although these judgments are normally made by state officials, they necessarily must be made by courts when those courts fashion injunctive relief to remedy serious constitutional violations in the prisons. These questions are difficult and sensitive, but they are factual questions and should be treated as such. Courts can, and should, rely on relevant and informed expert testimony when making factual findings. It was proper for the three-judge court to rely on the testimony of prison officials from California and other States. Those experts testified on the basis of empirical evidence and extensive experience in the field of prison administration.

The court found that various available methods of reducing overcrowding would have little or no impact on public safety. Expansion of good-time credits would allow the State to give early release to only those prisoners who pose the least risk of reoffending. Diverting low-risk offenders to community programs such as drug treatment, day reporting centers, and electronic monitoring would likewise lower the prison population without releasing violent convicts. The State now sends large numbers of persons to prison for violating a technical term or condition of their parole, and it could reduce the prison population by punishing technical parole violations through community-based programs. This last measure would be particularly beneficial as it would reduce crowding in the reception centers, which are especially hard hit by overcrowding. The court’s order took account of public safety concerns by giving the State substantial flexibility to select among these and other means of reducing overcrowding.

The State submitted a plan to reduce its prison population in accordance with the three-judge court’s order, and it complains that the three-judge court approved that plan without considering whether the specific measures contained within it would substantially threaten public safety. The three-judge court, however, left the choice of how best to comply with its population limit to state prison officials. The court was not required to second-guess the exercise of that discretion. Courts should presume that state officials are in a better position to gauge how best to preserve public safety and balance competing correctional and law enforcement concerns. The decision to leave details of implementation to the State’s discretion protected public safety by leaving sensitive policy decisions to responsible and competent state officials.
Establishing the population at which the State could begin to provide constitutionally adequate medical and mental health care, and the appropriate time frame within which to achieve the necessary reduction, requires a degree of judgment. The inquiry involves uncertain predictions regarding the effects of population reductions, as well as difficult determinations regarding the capacity of prison officials to provide adequate care at various population levels. Courts have substantial flexibility when making these judgments. “ ‘Once invoked, “the scope of a district court’s equitable powers ... is broad, for breadth and flexibility are inherent in equitable remedies.” ’ ”

Nevertheless, the PLRA requires a court to adopt a remedy that is “narrowly tailored” to the constitutional violation and that gives “substantial weight” to public safety. When a court is imposing a population limit, this means the court must set the limit at the highest population consistent with an efficacious remedy. The court must also order the population reduction achieved in the shortest period of time reasonably consistent with public safety.

The three-judge court concluded that the population of California’s prisons should be capped at 137.5% of design capacity. This conclusion is supported by the record. Indeed, some evidence supported a limit as low as 100% of design capacity. The chief deputy secretary of Correctional Healthcare Services for the California prisons testified that California’s prisons “ ‘were not designed and made no provision for any expansion of medical care space beyond the initial 100% of capacity.’ ” Other evidence supported a limit as low as 130%. The head of the State’s Facilities Strike Team recommended reducing the population to 130% of design capacity as a long-term goal. A former head of correctional systems in Washington State, Maine, and Pennsylvania testified that a 130% limit would “ ‘give prison officials and staff the ability to provide the necessary programs and services for California’s prisoners.’ ” A former executive director of the Texas prisons testified that a limit of 130% was “ ‘realistic and appropriate’ ” and would “ ‘ensure that [California’s] prisons are safe and provide legally required services.’ ” And a former acting secretary of the California prisons agreed with a 130% limit with the caveat that a 130% limit might prove inadequate in some older facilities.

The Federal Bureau of Prisons (BOP) has set 130% as a long-term goal for population levels in the federal prison system. The State suggests the expert witnesses impermissibly adopted this professional standard in their testimony. But courts are not required to disregard expert opinion solely because it
adopts or accords with professional standards. Professional standards may be “helpful and relevant with respect to some questions.” The witnesses testified that a limit of 130% was necessary to remedy the constitutional violations, not that it should be adopted because it is a BOP standard. If anything, the fact that the BOP views 130% as a manageable population density bolsters the three-judge court’s conclusion that a population limit of 130% would alleviate the pressures associated with overcrowding and allow the State to begin to provide constitutionally adequate care.

Although the three-judge court concluded that the “evidence in support of a 130% limit is strong,” it found that some upward adjustment was warranted in light of “the caution and restraint required by the PLRA.” The three-judge court noted evidence supporting a higher limit. In particular, the State’s Corrections Independent Review Panel had found that 145% was the maximum “operable capacity” of California’s prisons at although the relevance of that determination was undermined by the fact that the panel had not considered the need to provide constitutionally adequate medical and mental health care, as the State itself concedes. After considering, but discounting, this evidence, the three-judge court concluded that the evidence supported a limit lower than 145%, but higher than 130%. It therefore imposed a limit of 137.5%.

This weighing of the evidence was not clearly erroneous. The adversary system afforded the court an opportunity to weigh and evaluate evidence presented by the parties. The plaintiffs’ evidentiary showing was intended to justify a limit of 130%, and the State made no attempt to show that any other number would allow for a remedy. There are also no scientific tools available to determine the precise population reduction necessary to remedy a constitutional violation of this sort. The three-judge court made the most precise determination it could in light of the record before it. The PLRA’s narrow tailoring requirement is satisfied so long as these equitable, remedial judgments are made with the objective of releasing the fewest possible prisoners consistent with an efficacious remedy. In light of substantial evidence supporting an even more drastic remedy, the three-judge court complied with the requirement of the PLRA in this case.

The medical and mental health care provided by California’s prisons falls below the standard of decency that inheres in the Eighth Amendment. This extensive and ongoing constitutional violation requires a remedy, and a remedy will not be achieved without a reduction in overcrowding. The relief ordered by the three-judge court is required by the Constitution and was authorized by Congress in the PLRA. The State shall implement the order without further delay.

The judgment of the three-judge court is affirmed.

It is so ordered.

APPENDIXES
Justice SCALIA, with whom Justice THOMAS joins, dissenting.

Today the Court affirms what is perhaps the most radical injunction issued by a court in our Nation’s history: an order requiring California to release the staggering number of 46,000 convicted criminals.

There comes before us, now and then, a case whose proper outcome is so clearly indicated by tradition and common sense, that its decision ought to shape the law, rather than vice versa. One would think that, before allowing the decree of a federal district court to release 46,000 convicted felons, this Court would bend every effort to read the law in such a way as to avoid that outrageous result. Today, quite to the contrary, the Court disregards stringently drawn provisions of the governing statute, and traditional constitutional limitations upon the power of a federal judge, in order to uphold the absurd.

The proceedings that led to this result were a judicial travesty. I dissent because the institutional 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.

I

A

The Prison Litigation Reform Act (PLRA) states that “[p]rospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs”; that such relief must be “narrowly drawn, [and] extend[d] no further than necessary to correct the violation of the Federal right”; and that it must be “the least intrusive means necessary to correct the violation of the Federal right.” In deciding whether these multiple limitations have been complied with, it is necessary to identify with precision what is the “violation of the Federal right of a particular plaintiff or plaintiffs” that has been alleged. What has been alleged here, and what the injunction issued by the Court is tailored (narrowly or not) to remedy is the running of a prison system with inadequate medical facilities. That may result in the denial of needed medical treatment to “a particular [prisoner] or [prisoners],” thereby violating (according to our cases) his or their Eighth Amendment rights. But the mere existence of the inadequate system does not subject to cruel and unusual punishment the entire prison population in need of medical care, including those who receive it.
The Court acknowledges that the plaintiffs “do not base their case on deficiencies in care provided on any one occasion”; rather, “[p]laintiffs rely on systemwide deficiencies in the provision of medical and mental health care that, taken as a whole, subject sick and mentally ill prisoners in California to ‘substantial risk of serious harm’ and cause the delivery of care in the prisons to fall below the evolving standards of decency that mark the progress of a maturing society.” But our judge-empowering “evolving standards of decency” jurisprudence (with which, by the way, I heartily disagree does not prescribe (or at least has not until today prescribed) rules for the “decent” running of schools, prisons, and other government institutions. It forbids “indecent” treatment of individuals—in the context of this case, the denial of medical care to those who need it. And the persons who have a constitutional claim for denial of medical care are those who are denied medical care—not all who face a “substantial risk” (whatever that is) of being denied medical care.

The Coleman litigation involves “the class of seriously mentally ill persons in California prisons,” and the Plata litigation involves “the class of state prisoners with serious medical conditions.” The plaintiffs do not appear to claim—and it would absurd to suggest—that every single one of those prisoners has personally experienced “torture or a lingering death,” as a consequence of that bad medical system. Indeed, it is inconceivable that anything more than a small proportion of prisoners in the plaintiff classes have personally received sufficiently atrocious treatment that their Eighth Amendment right was violated—which, as the Court recognizes, is why the plaintiffs do not premise their claim on “deficiencies in care provided on any one occasion.” Rather, the plaintiffs’ claim is that they are all part of a medical system so defective that some number of prisoners will inevitably be injured by incompetent medical care, and that this number is sufficiently high so as to render the system, as a whole, unconstitutional.

But what procedural principle justifies certifying a class of plaintiffs so they may assert a claim of systemic unconstitutionality? I can think of two possibilities, both of which are untenable. The first is that although some or most plaintiffs in the class do not individually have viable Eighth Amendment claims, the class as a whole has collectively suffered an Eighth Amendment violation. That theory is contrary to the bedrock rule that the sole purpose of classwide adjudication is to aggregate claims that are individually viable. “A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties’ legal rights and duties intact and the rules of decision unchanged.”

The second possibility is that every member of the plaintiff class has suffered an Eighth Amendment violation merely by virtue of being a patient in a poorly-run prison system, and the purpose of the class is merely to aggregate all those individually viable claims. This theory has the virtue of being consistent with procedural principles, but at the cost of a gross substantive departure from our case law. Under this theory, each and every prisoner who happens to be a patient in a system that has systemic weaknesses—such as “hir [ing] any doctor who had a license, a pulse and a pair of shoes,”—has suffered cruel or unusual punishment, even if that person cannot make an individualized showing of mistreatment. Such a theory of the Eighth Amendment is preposterous. And we have said as much in the past: “If ... a healthy inmate who had suffered no deprivation of needed medical treatment were able to claim violation of his
constitutional right to medical care ... simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared: it would have become the function of the courts to assure adequate medical care in prisons.”  


Whether procedurally wrong or substantively wrong, the notion that the plaintiff class can allege an Eighth Amendment violation based on “systemwide deficiencies” is assuredly wrong. It follows that the remedy decreed here is also contrary to law, since the theory of systemic unconstitutionality is central to the plaintiffs’ case. The PLRA requires plaintiffs to establish that the systemwide injunction entered by the District Court was “narrowly drawn” and “extends no further than necessary” to correct “the violation of the Federal right of a particular plaintiff or plaintiffs.” If (as is the case) the only viable constitutional claims consist of individual instances of mistreatment, then a remedy reforming the system as a whole goes far beyond what the statute allows.

It is also worth noting the peculiarity that the vast majority of inmates most generously rewarded by the re-release order—the 46,000 whose incarceration will be ended—do not form part of any aggrieved class even under the Court’s expansive notion of constitutional violation. Most of them will not be prisoners with medical conditions or severe mental illness; and many will undoubtedly be fine physical specimens who have developed intimidating muscles pumping iron in the prison gym.

**B**

Even if I accepted the implausible premise that the plaintiffs have established a systemwide violation of the Eighth Amendment, I would dissent from the Court’s endorsement of a decrowding order. That order is an example of what has become known as a “structural injunction.” As I have previously explained, structural injunctions are radically different from the injunctions traditionally issued by courts of equity, and presumably part of “the judicial Power” conferred on federal courts by Article III:

“The mandatory injunctions issued upon termination of litigation usually required ‘a single simple act.’ Indeed, there was a ‘historical prejudice of the court of chancery against rendering decrees which called for more than a single affirmative act.’ And where specific performance of contracts was sought, it was the categorical rule that no decree would issue that required ongoing supervision.... Compliance with these ‘single act’ mandates could, in addition to being simple, be quick; and once it was achieved the contemnor’s relationship with the court came to an end, at least insofar as the subject of the order was concerned. Once the document was turned over or the land conveyed, the litigant’s obligation to the court, and the court’s coercive power over the litigant, ceased .... The court did not engage in any ongoing supervision of the litigant’s conduct, nor did its order continue to regulate its behavior.”

Structural injunctions depart from that historical practice, turning judges into long-term administrators of complex social institutions such as schools, prisons, and police departments. Indeed, they require
judges to play a role essentially indistinguishable from the role ordinarily played by executive officials. Today’s decision not only affirms the structural injunction but vastly expands its use, by holding that an entire system is unconstitutional because it *may produce* constitutional violations.

The drawbacks of structural injunctions have been described at great length elsewhere. This case illustrates one of their most pernicious aspects: that they force judges to engage in a form of factfinding-as-policymaking that is outside the traditional judicial role. The factfinding judges traditionally engage in involves the determination of past or present facts based (except for a limited set of materials of which courts may take “judicial notice”) exclusively upon a closed trial record. That is one reason why a district judge’s factual findings are entitled to plain-error review: because having viewed the trial first hand he is in a better position to evaluate the evidence than a judge reviewing a cold record. In a very limited category of cases, judges have also traditionally been called upon to make some predictive judgments: which custody will best serve the interests of the child, for example, or whether a particular one-shot injunction will remedy the plaintiff’s grievance. When a judge manages a structural injunction, however, he will inevitably be required to make very 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.

This feature of structural injunctions is superbly illustrated by the District Court’s proceeding concerning the decrowding order’s effect on public safety. The PLRA requires that, before granting “[p]rospective relief in [a] civil action with respect to prison conditions,” a court must “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.” Here, the District Court discharged that requirement by making the “factual finding” that “the state has available methods by which it could readily reduce the prison population to 137.5% design capacity or less without an adverse impact on public safety or the operation of the criminal justice system.” It found the evidence “clear” that prison overcrowding would “perpetuate a criminogenic prison system that itself threatens public safety,” and volunteered its opinion that “[t]he population could be reduced even further with the reform of California’s antiquated sentencing policies and other related changes to the laws.” It “reject[ed] the testimony that inmates released early from prison would commit additional new crimes,” finding that “shortening the length of stay through earned credits would give inmates incentives to participate in programming designed to lower recidivism,” and that “slowing the flow of technical parole violators to prison, thereby substantially reducing the churning of parolees, would by itself improve both the prison and parole systems, and public safety.” It found that “the diversion of offenders to community correctional programs has significant beneficial effects on public safety,” and that “additional rehabilitative programming would result in a significant population reduction while improving public safety.”

The District Court cast these predictions (and the Court today accepts them) as “factual findings,” made in reliance on the procession of expert witnesses that testified at trial. Because these “findings” have support in the record, it is difficult to reverse them under a plain-error standard of review. And given that the District Court devoted nearly 10 days of trial and 70 pages of its opinion to this issue, it is difficult to dispute that the District Court has discharged its statutory obligation to give “substantial weight to any adverse impact on public safety.”
But the idea that the three District Judges in this case relied solely on the credibility of the testifying expert witnesses is fanciful. Of course they were relying largely on their own beliefs about penology and recidivism. And of course different district judges, of different policy views, would have “found” that rehabilitation would not work and that releasing prisoners would increase the crime rate. I am not saying that the District Judges rendered their factual findings in bad faith. I am saying that it is impossible for judges to make “factual findings” without inserting their own policy judgments, when the factual findings are policy judgments. What occurred here is no more judicial factfinding in the ordinary sense than would be the factual findings that deficit spending will not lower the unemployment rate, or that the continued occupation of Iraq will decrease the risk of terrorism. Yet, because they have been branded “factual findings” entitled to deferential review, the policy preferences of three District Judges now govern the operation of California’s penal system.

It is important to recognize that the dressing-up of policy judgments as factual findings is not an error peculiar to this case. It is an unavoidable concomitant of institutional-reform litigation. . . .

But structural injunctions do not simply invite judges to indulge policy preferences. They invite judges to indulge incompetent policy preferences. Three years of law school and familiarity with pertinent Supreme Court precedents give no insight whatsoever into the management of social institutions. Thus, in the proceeding below the District Court determined that constitutionally adequate medical services could be provided if the prison population was 137.5% of design capacity. This was an empirical finding it was utterly unqualified to make. Admittedly, the court did not generate that number entirely on its own; it heard the numbers 130% and 145% banded about by various witnesses and decided to split the difference. But the ability of judges to spit back or even average-out numbers spoon-fed to them by expert witnesses does not render them competent decisionmakers in areas in which they are otherwise unqualified.

. . . .

C

My general concerns associated with judges’ running social institutions are magnified when they run prison systems, and doubly magnified when they force prison officials to release convicted criminals. As we have previously recognized:

“[C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.... [T]he 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 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.”

These principles apply doubly to a prisoner-release order. As the author of today’s opinion explained
earlier this Term, granting a writ of habeas corpus “‘disturbs the State’s significant interest in repose for
concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state
sovereignty to a degree matched by few exercises of federal judicial authority.’ ” Recognizing that
habeas relief must be granted sparingly, we have reversed the Ninth Circuit’s erroneous grant of habeas
relief to individual California prisoners four times this Term alone. And yet here, the Court affirms an
order granting the functional equivalent of 46,000 writs of habeas corpus, based on its paean to courts’
“substantial flexibility when making these judgments.” It seems that the Court’s respect for state
sovereignty has vanished in the case where it most matters.

III

In view of the incoherence of the Eighth Amendment claim at the core of this case, the nonjudicial
features of institutional reform litigation that this case exemplifies, and the unique concerns associated
with mass prisoner releases, I do not believe this Court can affirm this injunction. I will state my
approach briefly: In my view, a court may not order a prisoner’s release unless it determines that the
prisoner is suffering from a violation of his constitutional rights, and that his release, and no other relief,
will remedy that violation. 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; but a court may not order
the release of prisoners who have suffered no violations of their constitutional rights, merely to make it
less likely that that will happen to them in the future.

This view follows from the PLRA’s text that I discussed at the outset, 18 U.S.C. § 3626(a)(1)(A).
“[N]arrowly drawn” means that the relief applies only to the “particular [prisoner] or [prisoners]” whose
constitutional rights are violated; “extends no further than necessary” means that prisoners whose rights
are not violated will not obtain relief; and “least intrusive means necessary to correct the violation of the
Federal right” means that no other relief is available.*

I acknowledge that this reading of the PLRA would severely limit the circumstances under which a court
could issue structural injunctions to remedy allegedly unconstitutional prison conditions, although it
would not eliminate them entirely. If, for instance, a class representing all prisoners in a particular
institution alleged that the temperature in their cells was so cold as to violate the Eighth Amendment, or
that they were deprived of all exercise time, a court could enter a prisonwide injunction ordering that the
temperature be raised or exercise time be provided. Still, my approach may invite the objection that the
PLRA appears to contemplate structural injunctions in general and mass prisoner-release orders in
particular. The statute requires courts to “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief” and authorizes them to appoint Special Masters, provisions that seem to presuppose the possibility of a structural remedy. It also sets forth criteria under which courts may issue orders that have “the purpose or effect of reducing or limiting the prisoner population.”

I do not believe that objection carries the day. In addition to imposing numerous limitations on the ability of district courts to order injunctive relief with respect to prison conditions, the PLRA states that “[n]othing in this section shall be construed to ... repeal or detract from otherwise applicable limitations on the remedial powers of the courts.” The PLRA is therefore best understood as an attempt to constrain the discretion of courts issuing structural injunctions—not as a mandate for their use. For the reasons I have outlined, structural injunctions, especially prisoner-release orders, raise grave separation-of-powers concerns and veer significantly from the historical role and institutional capability of courts. It is appropriate to construe the PLRA so as to constrain courts from entering injunctive relief that would exceed that role and capability.

* * *

The District Court’s order that California release 46,000 prisoners extends “further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs” who have been denied needed medical care. 18 U.S.C. § 3626(a)(1)(A). It is accordingly forbidden by the PLRA—besides defying all sound conception of the proper role of judges.

Justice ALITO, with whom THE CHIEF JUSTICE joins, dissenting.

The decree in this case is a perfect example of what the Prison Litigation Reform Act of 1995 (PLRA), was enacted to prevent.

The Constitution does not give federal judges the authority to run state penal systems. Decisions regarding state prisons have profound public safety and financial implications, and the States are generally free to make these decisions as they choose.

The approach taken by the three-judge court flies in the face of the PLRA. Contrary to the PLRA, the court’s remedy is not narrowly tailored to address proven and ongoing constitutional violations. And the three-judge court violated the PLRA’s critical command that any court contemplating a prisoner release order must give “substantial weight to any adverse impact on public safety.” The three-judge court would have us believe that the early release of 46,000 inmates will not imperil—and will actually
I would reverse the decision below for three interrelated reasons. First, the three-judge court improperly refused to consider evidence concerning present conditions in the California prison system. Second, the court erred in holding that no remedy short of a massive prisoner release can bring the California system into compliance with the Eighth Amendment. Third, the court gave inadequate weight to the impact of its decree on public safety.

***

The prisoner release ordered in this case is unprecedented, improvident, and contrary to the PLRA. In largely sustaining the decision below, the majority is gambling with the safety of the people of California. Before putting public safety at risk, every reasonable precaution should be taken. The decision below should be reversed, and the case should be remanded for this to be done.

I fear that today’s decision, like prior prisoner release orders, will lead to a grim roster of victims. I hope that I am wrong.

In a few years, we will see.
Today the United States is the world’s warden, incarcerating more people than any other country. With just 5 percent of the world’s population, it has 25 percent of its prisoners. Since the 1970s, the United States has built the largest penal system in the world to accommodate a sixfold increase in its inmate population. But what happens behind its prison walls generally remains far removed from public consciousness. In this context, the Supreme Court’s landmark decision in Brown v. Plata last month, which declared that the degrading and inhumane conditions
California’s grossly overcrowded prisons are unconstitutional, was an exceptional moment when the prison wall was briefly breached.

Of course, Brown v. Plata does not mark the beginning of the end of mass incarceration in the United States, nor of the abusive conditions that proliferate in U.S. prisons and jails. Unlike the landmark prisoners’ rights cases of the 1960s and 1970s, this decision is unlikely to spur many successful copycat lawsuits to impose prison population caps and revitalize the courts as a major forum to challenge abusive prison conditions. The Prison Litigation Reform Act (PLRA), enacted by Congress in 1996 to greatly constrict prisoners’ access to the courts and to reduce the judiciary’s role in monitoring the penal system, continues to present formidable obstacles for inmates seeking to challenge their conditions of confinement. For those few cases that successfully navigate the PLRA and make it into the courts, the legal process is long and protracted. Remarkably, the U.S. prison and jail population has more than doubled since 1990, the year that one of the two lawsuits eventually consolidated in Brown v. Plata was initially filed.

Moreover, Brown v. Plata is not even likely to spur major reductions in California’s inmate population any time soon. This is because the Supreme Court conceded great latitude to the Golden State in how to reduce overcrowding in its prisons and by when. State officials could choose to release some prisoners early. But they could also address the population cap affirmed by the Supreme Court by sending more prisoners to out-of state penal facilities or to county jails in California. Or California could simply build more prisons.

So why, then, is this a landmark decision with enormous implications for the future course of penal policy reform in the United States? More so than many other Supreme Court decisions, Brown v. Plata was as much a political statement as a legal one. It did not render the PLRA restrictions on challenging the conditions of confinement through the courts any less arduous. But it did pry open some important political space that could help incubate political solutions to the problem of mass incarceration in the United States.
The first way in which the Court opened up some political space for prison reform was by making the abhorrent conditions in California’s prisons strikingly visible. In the nineteenth century, prisons opened their doors to the public and were popular destinations for gawking domestic and foreign tourists. In the 1960s and early 1970s, prison memoirs and accounts of life behind bars regularly turned up on best-seller lists. Today, however, the U.S. penal system is distinctive not only because of its huge size, but also because of its relative invisibility—leaving aside television shows like Oz, which contribute to a grossly distorted view of what is at stake in mass incarceration. The hundreds of prisons and jails that dot rural America and the desolate outskirts of cities, the 2.4 million men and women currently locked up, the 750,000 former offenders released from prison each year with stunted life chances, and the struggles of the millions of children with an incarcerated mother or father tend to leave little trace on the wider public consciousness.

Justice Anthony M. Kennedy, writing for the majority in this acrimonious 5-4 decision, graphically catalogued the appalling conditions in California's penal system, which operates at about 200 percent of capacity: as many as 50 sick inmates at a time held in 12 by 20 foot cages for up to five hours as they await medical treatment; as many as 54 prisoners sharing a single toilet; year-long waits for mental health treatment; a suicide rate nearly twice the national average for prisoners; a needless death every six to seven days because of delayed or inadequate medical care; and the “dry cages,” where suicidal prisoners are kept in telephone booth-sized enclosures without toilets. In case words were not enough, Kennedy appended to his decision photos of the “dry cages” and of a gymnasium-style room crammed with dozens of prisoners and their bunk beds. This was a rare instance where the Court turned to visual evidence to bolster a decision.

The second way in which the Court’s decision may prove important is its assiduous efforts to bring wider perceptions of the public safety effects of incarceration into better alignment with the latest social science research. In the decades-long prison
build-up, penal expertise has been sidelined for the most part in public debates over crime and punishment. In an important departure, Kennedy showcased key findings of leading experts on crime and punishment about the association between mass incarceration and public safety. Kennedy noted that several states have successfully cut their prison populations without seeing their crime rates escalate. He also highlighted other important research findings, including that prisons might actually be criminogenic. As many experts on crime have noted, mass incarceration may actually increase the crime rate because imprisonment severs inmates' ties to their jobs, families, and communities, expands opportunities for criminal networking, and subjects inmates to overcrowded and abusive conditions.

But if Brown v. Plata gives politicians in California some political cover to begin charting a new course for penal reform in the Golden State, what is still lacking in California and elsewhere is a political movement that can transcend the current political climate, which remains deeply and reflexively punitive. As Kennedy made clear in his decision, absent a political push for reform neither this ruling nor others by the courts are likely to be the major catalyst to reverse the prison boom or ameliorate abusive prison conditions. The “constitutional violations in conditions of confinement are rarely susceptible of simple or straightforward solutions,” Kennedy explained. “In addition to overcrowding the failure of California’s prisons to provide adequate medical and mental health care may be ascribed to chronic and worsening budget shortfalls, a lack of political will in favor of reform, inadequate facilities, and systemic administrative failures,” he continued.

As of yet, no factor, including the current fiscal crises in the states, has provided sufficient political impetus for comprehensive penal reform to slash the inmate population. California, for instance, has been teetering on the brink of fiscal and social disaster for several years. Yet the state has been unable or unwilling to pursue sensible and proven penal reforms to reduce its prison population in ways that do not seriously jeopardize public safety. Indeed, over the past three decades,
the Golden State has gone from spending five dollars on higher education for every
dollar spent on corrections to almost a dead-heat on spending. And yet California
still holds fast to the toughest three-strikes law in the nation.

Moreover, recent attempts at reform have fallen flat. California voters soundly
rejected a ballot initiative in 2008 that would have expanded alternative sentences
for nonviolent drug offenders and saved billions of dollars. Governor Arnold
Schwarzenegger and four former governors opposed this measure, including Jerry
Brown, who was then attorney general and is now once again governor. And a
legislative proposal in 2009 to release some nonviolent offenders in response to the
federal lawsuit ultimately decided by Brown v. Plata created a political firestorm. A
significantly weaker bill eventually passed the state assembly without a vote to
spare. One assemblyman opposed to the measure warned: “We might as well set off
a nuclear bomb in California with what we are doing with this bill.”

Brown v. Plata has unleashed comparable over-the-top law-and-order rhetoric,
beginning with the Supreme Court justices who dissented from this decision. They
were dismissive of leading social science evidence that prison populations could be
lowered without adversely affecting public safety. Justice Samuel A. Alito
denounced what he misleadingly characterized as “the premature release of
approximately 46,000 criminals—the equivalent of three Army divisions.” (Yes, the
italics are his.) He charged that the Court was “gambling with the safety of the
people of California” and that the result would likely be “a grim roster of victims.”

Mass incarceration in the United States is the result of a complex set of political,
institutional, and economic developments. No single factor explains the
unprecedented rise in the U.S. incarceration rate, and no single factor will reverse
the prison boom. What is needed is a broad-based political movement that focuses
not just on the economic burden of the penal system, but also on how the massive
carceral state rests on stark racial and other inequities and is itself a threat to public
safety. Without such a movement, it will not be possible to make deep and
sustainable cuts in the incarcerated population and to address the needs of the
individuals, families, and communities decimated by the decades-long build up of
the carceral state. One can only hope that Brown v. Plata proves an important first step.

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California has embarked on a prison downsizing experiment of historical significance. Facing a U.S. Supreme Court decision, Brown v. Plata, which ordered the state to reduce its prison population by 25% within two years, Governor Jerry Brown signed the Public Safety Realignment Act (AB 109). Realignment transferred authority for large numbers of convicted felons from the state prison and parole system to the state’s fifty-eight counties. Counties were given state funding to deal with the increased number of offenders, and each county was given nearly unbridled discretion to develop its own custodial and post-custody plan. The hope is that Realignment, with its focus on locally designed rehabilitative services, will not only reduce prison overcrowding but also the state’s 64% recidivism rate—meaning that six out of ten people who left a California prison returned to a California prison within three years of release.

At the time of the Plata ruling on May 23, 2011, California’s in-state prison population was approximately 162,000, down from an all-time high of 173,614 or 200% of design capacity in 2007. By upholding the three-judge panel’s population cap of 137.5%, the Supreme Court was ordering the California Department of Corrections and Rehabilitation (CDCR, the state’s prison system) to reduce its prison population to 109,805, a reduction of about 35,000 prisoners or 25% of all prisoners housed at the time. The task was not only daunting; it also represented the largest court-ordered reduction in prison populations ever in the United States. As the editor of Prison Legal News wrote, “Without doubt this is the most significant prisoner rights ruling of the 21st century, and it will no doubt keep that distinction for a long while.”

Laws are seldom self-executing, and research has consistently shown that practitioners—those responsible for translating “law-on-the-books” to “law-in-action”—determine eventual success. Realignment impacts every decision along the stages of the criminal justice system, from arrest through sentencing and release from custody. Realignment also allows each county unprecedented flexibility and authority to design programs and services to manage realigned offenders in a way that makes the most sense locally. California is not only experimenting with how to downsize prisons, but its fifty-eight counties are experimenting with fifty-eight different approaches to sentencing and corrections reform.
The Economist recently called Realignment, “one of the great experiments in American incarceration policy.”

Ultimately, whether California’s Realignment experiment turns out to be just a short-term response to the state’s prison crowding problem or a longer-term solution with national implications for reducing mass incarceration and its attendant costs is squarely in the hands of local justice officials. If it works, California--the nation’s largest state and home to one out of every ten U.S. prisoners--will have shown that it can downsize prisons safely by transferring lower-level offenders from state prisons to county systems, using an array of evidence-based community corrections programs. California might not only alleviate a crisis, but also become a model for other states. If it does not work, counties will have simply been overwhelmed with inmates, unable to fund and/or operate the programs those felons needed, resulting in rising crime, continued criminality and jail (instead of prison) crowding.

This article presents the results of the first comprehensive look at how California’s fifty-eight diverse counties are handling this titanic shift. During the second year of Realignment’s implementation, a team of researchers at Stanford Law School conducted wide-ranging interviews with 125 staff in municipal police departments, county sheriffs’ departments, courts, prosecutors’ offices, public defender agencies, and probation departments. These officials are responsible for turning AB 109 law into reality. We also spoke with victim service agencies and offenders. Interviewees were selected to represent diversity in agency and county perspectives. We basically wanted to know how Realignment was working from their county and agency perspectives and what changes were needed moving forward.

The findings illustrate that Realignment gets mixed reviews so far. Everyone agreed county officials are working more collaboratively toward reducing recidivism, and that new funding has fostered innovative programming. But our interviews also found counties struggling, often heroically, to carry out an initiative that was imposed upon them almost overnight. Along with the increases in jail and probation populations, many counties are dealing with more criminally sophisticated offenders. When offenders reoffend, there is often no space in county jails to house them. Sheriffs worried that the overcrowding and health care problems that led to Brown v. Plata could morph into county-level versions of the state problem. Prosecutors lamented the deep jail discounts given to arrestees due to crowded jails.

Judges were cautiously optimistic that mental health and other collaborative courts could reduce recidivism but worried about the lack of split sentencing. AB 109 allows courts the option to split sentences between time in jail and time under supervised release. Counties administer the programs but the state pays for them. Some counties are taking advantage of split sentencing, but in Los Angeles County, only 5% of felons have their sentences split, and the rest walk out of jail without supervision or services of any kind. Judges, prosecutors, and victim service agencies were increasingly concerned about victim protection, and the neglect of victims’ constitutional rights under the Victims’ Bill of Rights Act of 2008. The California Constitution provides victims with the right to receive notice of and to be heard at any proceeding involving a post-arrest release decision in which the right of the victim is at issue. Realignment has yet to fully integrate these victim rights with new policy and practices.

Probation officials were the most optimistic about Realignment and hoped that after a reasonable
transition time and the institutionalization of better rehabilitation programming, counties will be able reduce their jail populations without compromising public safety. Doing so will require the use of risk assessments, better coordination of decision-making and information-sharing among state and county agencies, and more innovative and cost-effective use of alternatives to incarceration. Some counties are succeeding with their new responsibilities and funding, and their success can provide a blueprint for other counties on how to reduce offender recidivism.

Despite the distinctive experience across California’s counties, most everyone agreed that changes forced by Realignment were overdue and, if given time, AB 109 will result in a better overall system. But legislative revisions are urgently needed. Stakeholders recommended using an offender’s entire criminal history and risk level when determining whether the county or state should supervise, capping county jail sentences at three years, and requiring split sentences (jail combined with probation) for all serious felons, along with several other improvements. Elected leaders seem to be listening and progress is being made on these and several other fixes, as discussed in Part IV. If progress continues, California’s Realignment experiment may not only satisfy the courts but also serve as a springboard to rethink the nation’s overreliance on prisons.

This article proceeds as follows: Part I presents a brief overview of the history of the Plata litigation, with a focus on overcrowding and prison capacity. Part II presents a brief overview of the Public Safety Realignment Act, including a description of its goals beyond prison crowding, target population, and funding plan. Part III lays out the findings from our stakeholder interviews, with separate sections devoted to probation officers, public defenders and prosecutors, the police, sheriffs, judges, and victims. Our conclusions and stakeholder recommendations are contained in Part IV.

I. Brown v. Plata and Its Preceding Litigation

It has been three years since the U.S. Supreme Court affirmed California’s prisoner overcrowding order, spurring an unprecedented overhaul of California’s sentencing and corrections system. In Brown v. Plata, the Supreme Court affirmed the three-judge district court’s 2009 remedial order requiring the state to reduce its prison population to 137.5% of design capacity within two years. Justice Kennedy’s majority opinion concluded that “without a reduction in overcrowding, there will be no efficacious remedy for the unconstitutional care of the sick and mentally ill” inmates in California’s prisons.

The Supreme Court did not actually order prisoner releases. Justice Kennedy wrote, “The order in this case does not necessarily require the State to release any prisoners. The State may comply by raising the design capacity of its prisons or by transferring prisoners to county facilities or facilities in other States.” Justice Kennedy conceded that there was “no realistic possibility that California would be able to build itself out of this crisis,” in light of the state’s financial problems. In 2011, California was facing a daunting $25 billion shortfall and future estimated annual budget gaps of $20 billion.
The state had already spent billions of dollars trying to comply with the federal lawsuits, and spending on inmate medical, dental, and mental health care had more than doubled over the last decade to a projected $2.3 billion annually by 2012. California also spends three times more per inmate on medical care than any other state. Overall, state spending on corrections more than tripled as a share of all state expenditures, rising from 3% in 1980 to nearly 11% ($9.6 billion) in 2011. California’s annual spending per inmate was $51,889 in 2011-2012--65% more than the U.S. national average of $31,286.

But despite the state’s extraordinary spending on prisons, its return-to-prison recidivism rate is among the nation’s highest at 57.8%, far outpacing the national average of 43.3%. As I concluded in my review of the California system, “No other state spends more on its corrections system and gets less.”

A. Public Safety Realignment (AB 109): California’s “Most Viable Plan”

How could state officials possibly respond to the Court’s Plata order? After all, it meant reducing the state’s prison population to pre-1993 levels when California had six million fewer residents. The answer to the Plata ruling was the 2011 Public Safety Realignment Act (“Realignment” or “AB 109”), signed by Governor Jerry Brown on April 4, 2011. The core of Realignment’s population reduction was transferring responsibility for thousands of non-serious, non-violent, and non-sexual cases (“N3s”) to counties through detention and/or supervision. Felons convicted of certain serious, violent, and aggravated sex offenses continue to serve their time in state prison, but sentences for more than five hundred other felony crimes must be served through county jail time or probation. After October 1, 2011, counties must now handle virtually all drug and property crime sentences, which represented 54% of all adults convicted in 2010.

Governor Brown expressed confidence that California’s system was prepared for these changes, noting, “It’s bold, it’s difficult and it will continuously change as we learn from experience. But we can’t sit still and let the courts release 30,000 serious prisoners. We have to do something, and this is the most-viable [sic] plan that I’ve been able to put together.”

Governor Brown correctly predicted the immediate reduction in prison populations. During 2012, the first full year of Realignment, total admissions to California prisons declined 65%, from 96,700 admissions in 2011 to 34,300 admissions in 2012. Admissions to California prisons on parole violations decreased by 87%, from 60,300 in 2011 to 8000 in 2012. California went from admitting 140,800 offenders to prison in 2008 to 33,990 in 2012--nearly an 80% decrease in prison admissions in just four years.

Without a doubt, this is the largest reduction in prison admissions ever undertaken in the United States. In fact, the Department of Justice recently announced a 1.7% decline in the U.S. prison population from 2011 to 2012, marking the third consecutive year of slight decreases. But over half (51%) of the nation’s entire prisoner count reduction comes from the 10% decline in California. Excluding the decline in California’s prison population, the nationwide prison population would have remained relatively stable during recent years.
But by year-end 2013, California’s in-state prison population was about 125,000 inmates, still 16,000 inmates over the population cap set by the courts. In January 2013, California told the district courts it would be unable to meet the 137.5% capacity requirement, stating that “the population reductions currently required by the [Supreme] Court cannot be achieved by means that are consistent with sound prison policy or public safety.”

On January 24, 2014, the state requested an additional two years to meet the population reduction deadline. In a clear legal win for Governor Brown, on February 10, 2014 the three-judge panel granted California a two-year extension and ordered the state to reduce the adult prison population to 137.5% of design capacity by February 28, 2016. In a statement, Governor Brown said, “the state now has the time and resources necessary to help inmates become productive members of society and make our communities safer.”

From the state’s perspective, the population targets are within reach, the state is on the right path in redirecting resources from prison to programs, and Realignment just needs more time to work. But the burden shifted to California’s counties is enormous, and how they carry out their newfound obligations will ultimately determine Realignment’s success.

The critical question remains: How are counties managing the influx of prisoners and parolees? After all, they have to absorb tens of thousands of diverted prisoners and parolees. Shifting these lower-level offenders to local custody could strain county health care and social services programs further. State budget cuts have already devastated many of the essential programs upon which former prisoners depend, especially for mental health care and alcohol and drug treatment.

II. An Overview of Public Safety Realignment (AB 109)

The Legislature made it clear that Realignment was not intended to be solely a narrow mechanism of compliance with the Plata mandate; rather, Realignment was aimed at the source of the overcrowding problem--getting offenders the help they need so they won’t recidivate. AB 109 states that “the purpose of justice reinvestment is to manage and allocate criminal justice populations more cost-effectively, generating savings that can be reinvested in evidence-based strategies that increase public safety while holding offenders accountable.”

Theoretically, Realignment is designed to promote rehabilitation and reentry by moving offenders closer to their families and community-based services. Community agencies can more easily access inmates in local jails, building relationships and encouraging inmates to access their services after release. In fact, recognizing that change is best achieved at the local level and that counties are better at rehabilitating offenders than the state is one of the underlying premises of the bill.

The Legislature’s underlying hope, as written in the general legislative findings to Realignment, declares that instead of solely adding jail capacity, the Legislature views AB 109 as a “reinvest[ment]” of
resources to support “locally run community-based programs” and evidence-based practices “encompassing a range of custodial and noncustodial responses to criminal or noncompliant offender activity.” The legislation further defines evidence-based practices as those “supervision policies, procedures, programs, and practices demonstrated by scientific research.”

Each county was required to create a Community Corrections Partnership (“CCP”) to develop a comprehensive plan for carrying out AB 109’s demands in their local jurisdiction. The legislation placed few limits on how counties could spend their money, and it did not require them to report any results to the state or to measure the outcomes of their programs. Built upon the principle of increased local control, counties are free to rely heavily on their local jails, invest in law enforcement personnel, or choose from a wide variety of less severe (public and private) alternatives, such as electronic monitoring, drug courts, day reporting centers, or split sentencing (a sentence in which the offender serves a reduce jail term followed by probation). As a result of these strengthened partnerships, Realignment is providing the space for fifty-eight coalitions to think about how to do things better in their localities. A study of the counties’ first year Realignment spending plans found that they vary tremendously in terms of how their funding is allocated and the issues that they have prioritized.

A. Target Offender Population and Program Funding

California’s Public Safety Realignment Act (AB 109) is quite comprehensive. It touches every aspect of criminal case processing from arraignment and bail through discharge from parole. The initial Public Safety Realignment Act was signed into law on April 4, 2011. It is now over eight hundred pages long, and has been clarified and amended six times since its original passage.

While the legislation is complex, it has three basic functions. First, it requires offenders convicted of a low-level felony after October 1, 2011 to serve their sentences locally, rather than in state prison. Low-level offenders are defined as those who do not have a current or prior conviction for a violent, serious, or sex crime—the so-called “non-non-non” (“N3”) offenders. California Penal Code §1170(h) defines the crimes that cannot be sentenced to prison, and California Penal Codes §1192.7(c) and 667.5(c) define “serious” or “violent” felony convictions. Virtually all drug and property offenses are now served in county jail. In addition, many officials were troubled by AB 109’s definition of “low-level offenders,” with many suggesting it vastly understated the seriousness of some crimes included in the original bill. In response to that concern, clean-up legislation (AB 118) was passed just one month after AB 109 was signed, identifying approximately eighty non-violent, non-serious, and non-sexual crimes, and designated them as still punishable by state prison. But many other serious crimes remain punishable only by a jail term, including commercial burglary, most drug crimes, vehicular manslaughter, possession of weapons, identity theft, elder financial abuse, and hate crimes. AB 109 did not release any prisoners or make any changes to the length of sentence; it only stipulated that the sentence must be served in county jail and not state prison.

Second, AB 109 requires counties to supervise low-level offenders released from state prison after October 1, 2011. Prior to AB 109, virtually all offenders who completed their prison sentences were
paroled to their home counties, supervised by state parole agents. Since October 1, 2011, lower-level parolees are supervised by county probation rather than state parole. State parole agents will only supervise individuals released from prison whose current offense is serious or violent, or who are assessed to be mentally disordered or high risk sex offenders. Former parolees are now supervised by probation officers under post-release community supervision (PRCS). To qualify for PRCS, “low-level” means that released inmates: (1) did not serve their just completed prison term for a violent or serious felony, although the inmate could have served a prior prison term for a violent or serious felony; (2) are not classified by CDCR as high-risk sex offenders; (3) are not a third-striker under the state’s Three Strikes law; and (4) are not required to undergo treatment by the Department of Mental Health.

By December 2013, just twenty-seven months after AB 109 went into effect, CDCR reported that the parole population had fallen from 132,424 in 2010 to 47,885—a 64% decline, bringing it back to 1987-88 population levels. As a result of this massive downsizing, the CDCR Division of Adult Parole Operations reduced its staff by 45 percent in the first two years post-realignment, with additional layoffs continuing. There is no doubt that California has seen some of the nation’s steepest increases in parole populations and is now witnessing, by far, the nation’s steepest decreases.

Third, AB 109 prohibits the return of most probationers and parolees to prison for “technical” violations (i.e., violations of the rules of supervision rather than the commission of a new crime). Instead, AB 109 establishes a maximum penalty of 180 days in county jail for technical violators. As of July 1, 2013, county court-appointed hearing officers will decide how to respond to technical violations, and they can use their discretion to impose jail time, refer to community programs, or continue on supervision without sanction—but they can not return the offender to prison. Prior to Realignment, these non-serious technical violators--about 15,400 to 18,000 parolees each year--were sent to prison.

Realignment funding may be one of the most important determinants of its success. The California Department of Finance uses a formula to determine each county’s funding level primarily based on how many offenders are projected to be realigned to the counties. Roughly speaking, the Legislature funded Realignment by giving counties about half of the current cost of state prison (which was about $56,000 per year, per offender 2012-13) and parole supervision (about $6,000 per year, per offender). Through AB 109, the Legislature has allocated over $7 billion in the first two years of implementation to assist California’s fifty-eight counties in carrying out the legislation’s provisions. Counties were initially worried that state funding could be discontinued. But California voters passed Proposition 30 in November 2012, a sales and income tax increase, which guarantees in the State Constitution funding for Realignment going forward. With Realignment funding constitutionally guaranteed, county officials might be more willing to commit to long-term planning, prevention, and non-traditional avenues for minimizing the use of prison.

This infusion of new funding far surpasses any similar allocation for adult offender rehabilitation in California history, and the funding is now guaranteed for the next several years. Critics of Realignment say the money could better be spent on health, education, and mental health programs for people not involved in the justice system. But proponents argue that reducing incarceration has far-reaching ripple effects that benefit everyone. Of course, the extent of any impacts from Realignment depends on how it
is going for local criminal justice agencies, the subject to which we now turn.

III. From Rhetoric to Reality: How Stakeholders View The Impacts of Realignment

California is the largest and most diverse state in the nation, and we wanted our study to represent that diversity. To capture this variability, we first selected counties that differed in crime rates, financial resources, politics, demographics, and pre- and post-Realignment orientation towards the use of incarceration versus community-based options. Within the selected counties, we then interviewed the major criminal justice stakeholders. Between November 2012 and August 2013, we interviewed 125 officials in twenty-one counties. Our interviews took place during the second year of AB 109 implementation. By year two, stakeholders had useful experience with how Realignment was impacting counties. After all, more than 100,000 offenders have had their sentences altered through mid-2013. These offenders used to be under state control and faced prison terms but now remain in local communities where jail is the most severe sanction they confront.

Our interviews were informal, semi-structured conversations usually lasting one to two hours. Our goal was to determine how Realignment had influenced their agency’s work and what changes they would make to the law.

Broadly speaking, Realignment gets mixed reviews so far. Our interviews elicited a portrait of counties struggling, often heroically, to carry out an initiative that was poorly planned and imposed upon them almost overnight, giving them little time to prepare.

Kim Raney, then-President of the California Police Chiefs Association, said, “The first year was like drinking from a fire hose,” as counties scrambled to cope with an influx of offenders far larger than expected, and with more serious criminal histories and needs. That said, everyone agreed Realignment is here to stay and that the old system was yielding disappointing results and siphoning too many taxpayer dollars from other vital public programs. Those interviewed also agreed that Realignment has the potential to improve the handling of lower-level property and drug felons. But as our conversations revealed, AB 109 has wrought tremendous change in every phase and at every level of the criminal justice system, requiring many painful adjustments. Realignment asks stakeholders to put aside personal agendas and work collaboratively toward a shared goal of reducing recidivism. Although everyone embraces that goal, getting there is proving a monumental and often frustrating challenge, and many unintended consequences of this well-intentioned law are surfacing along the way.

Despite the obstacles, our interviews suggest that even in the early going, counties are experiencing some success. Officials reported collaborating with one another in surprising and unprecedented ways, embarking on jointly funded initiatives, eliminating duplication, and approaching justice from a system-wide perspective, rather than a narrower agency perspective. Realignment has also encouraged counties to take a more holistic view of offender needs, treating them within their family and community contexts.
Overall, many stakeholders expressed a realistic attitude toward Realignment, noting that, when it comes to crime and punishment, pendulum shifts take time and achieving results requires stamina and patience. Realignment represents a titanic policy shift and tremendous opportunity for reform, but it will only deliver lasting benefits if counties can make it work. But while these general perspectives were shared, different agencies voiced very different views about how Realignment is going so far.

A. Probation

Of all the agency staff interviewed, representatives of probation— the workhorse of the criminal justice system, especially under AB 109—spoke with the most unified and positive voice. They unequivocally felt that Realignment gave them an opportunity to fully test whether well-tailored rehabilitation services can keep lower-level felony offenders from committing new crimes and returning to prison. If Realignment is to amount to more than an experimental, emergency response to a court directive over prison crowding, it will depend heavily on how well probation agencies deliver effective programs and services. Probation is, in essence, the epicenter of Realignment, burdened with the massive responsibility— unfair as it may seem— of determining how best to change offender behavior.

With more than $300 million— or 25% of the total AB 109 allocations— flowing into probation in the first year alone, there is no doubt that the long-underfunded agencies are producing positive results. Our interviews showed that across the state, probation agencies have launched pilot projects that, if successful, will significantly strengthen community corrections in California and nationally. One of the most promising options is the Day Reporting Center (DRC), often described as “one-stop” centers where offenders can access educational programs, cognitive behavioral therapy, and employment services, and meet with probation officers. Offenders are assessed for needs and then matched to services that best address those needs. At least twenty-five California counties now have DRCs, virtually all of them receiving some AB 109 funding. Most counties have also expanded their electronic monitoring programs, often coupled with rehabilitation and education programs. Interestingly, private correctional companies operate many of the newer AB 109-funded programs, as they were nimble and flexible enough to quickly develop the variety of programs that local counties deemed necessary.

In addition, nearly all probation agencies reported adopting risk and needs classification instruments to measure an offender’s predicted risk of recidivism and to help target treatment to those most likely to benefit. The adoption of such actuarial tools is fundamental to delivering evidence-based services and has professionalized probation by allowing officials to better triage services and the level of monitoring provided by officers.

While new funding has made new things possible, our interviews confirmed the hard realities and additional burden probation agencies are facing. Above all, probation chiefs expressed frustration with the poor policy and planning that preceded Realignment, lamenting that it all happened far too fast, and that at times, they simply feel overwhelmed. The unanticipated volume of offenders was one problem. State prison officials provided counties with a projection, but the numbers were often inaccurate, sometimes wildly so. For example, Orange County Sheriff Sandra Hutchens said that Orange County
received twice as many inmates as the state Department of Corrections and Rehabilitation had forecast.

The seriousness of the realigned population’s criminal backgrounds was also unexpected and remains probation officers’ most serious challenge. This issue has caused the most controversy throughout all the agencies: the state had indicated that only non-violent offenders would be placed under local supervision, yet a large number of AB 109 offenders have prior convictions for violent crimes. A recent analysis by University of California Irvine (UCI) researchers found that released prisoners diverted to county probation/PRCS supervision were higher risk than those retained on state parole supervision--exactly the opposite of Realignment’s intent. The UCI report concludes, “[C]ounties are receiving some of the most criminally active offenders in the state . . . .”

County officials in the larger counties are feeling the burdens most intensely. Los Angeles (LA) County, for example, operates the largest probation population in the world. Prior to AB 109, LA County was supervising more than 80,000 probationers. AB 109 added about 18,400 PRCS adult felons to LA Probation’s caseload in the first two years of Realignment.63 LA Chief Probation Officer Jerry Powers reported that according to their LS/CMI risk assessment, 67% of the offenders who have been sent to LA Probation by the State for PRCS/county supervision score high risk, and just 3% score low risk.

. . . .

Los Angeles Probation recently reported that the one-year recidivism rate--defined as a return to custody based on a new arrest, conviction, revocation, or flash incarceration (a jail stint of ten days or less imposed for violating probation)--for offenders released from prison to Los Angeles County on PRCS was 60%.

Of course, the State says it provided Los Angeles County with nearly $600 million in the first two years to help deal with the situation--increasing LA Probation’s annual operating budget by about 35%. The Department is in the process of hiring 360 new officers to bring officers’ caseloads down, but there are still seventy-two offenders for every one probation officer--arguably too high to closely monitor such high-risk offenders. The Department is also in the process of arming more of its probation officers to handle these more serious offenders, along with increasing funding for drug and mental health treatment. Chief Powers is making the unprecedented move to more than triple the number of his armed probation officers, from thirty to one hundred. “It is a natural response to an ever increasing number of higher threat individuals and the operations that go along with supervising them,” Powers said in our interview.

Central to the larger issues about Realignment’s impact on probation going forward is how this infusion of more serious offenders will change the character and culture of the quasi-rehabilitative role that probation has historically played--and AB 109 funding was supposed to strengthen. Historically, probation has been designed to be the supportive stage of the criminal justice process, relative to arrest, trial, and incarceration. How can a probation officer engage in “motivational interviewing” (a technique to create a greater bond between officer and client, and a key component of evidence-based practices) when the probation officer has a weapon strapped to his or her waist?
Compounding these problems, offenders were shifted to county responsibility well before probation departments and service providers had sufficient staff and programs in place to treat them. Hiring new probation staff was one challenge, given cumbersome county government requirements involving a lengthy process of advertising, interviewing applicants, checking references, and giving preference based on seniority. Similar delays slowed the signing of contracts for services, particularly with agencies that were not already part of the county governance structure or community providers that did not have existing contracts with probation, such as electronic monitoring companies. The accelerated timeframe also deprived counties of time to assess programs described as anchored in evidence-based practices or, once funded, to monitor the quality of services being delivered.

Almost two years into Realignment, probation chiefs said such pressures were easing, and many felt confident in the quality of programs taking root in their counties. In fact, the California State Association of Counties highlighted eleven counties in 2013 that are using their AB 109 funding to help offenders succeed. Examples include Ventura County’s Specialized Training and Employment (STEPS) program that helps offenders connect with local employers, Merced County’s “All Dads Matter” program which teaches fathers parenting skills and how to reconnect with their children, and Marin County’s Recovery Coaches effort, which identifies community mentors to assist offenders with drug, alcohol, and mental health needs. These and dozens of other new and innovative programs are being made possible by AB 109 funding and, over time, will undoubtedly serve as incubator sites and pilot tests for scaling up of successful interventions.

Even the best programs, however, cannot produce results if offenders are not participating in them, and, across the state, the lack of split sentencing remains a problem. Split sentencing is a jail term followed by probation supervision. AB 109 allows judges to have significant leeway to impose any distribution of incarceration and supervision that they deem appropriate. A recent study found that rates of split sentencing varied greatly across counties, but that statewide 75% of all offenders in the first year of Realignment did not receive a split sentence. One of the core principles of evidence-based practices is the combination of custody and aftercare. Without split sentencing, probation officials have no ability to work with offenders or monitor their compliance. If that pattern persists, recidivism rates will remain high. Aware of that likelihood, probation officials support legislative changes that would mandate split sentencing, particularly for the more serious realigned felons most in need of supervision and services.

**B. Public Defenders and Prosecutors**

Both district attorneys and public defenders believed Realignment had given defense attorneys more leverage in their negotiations with prosecutors, but beyond that issue, they did not agree on much in our interviews. Public defenders, who provide legal representation for indigent defendants, supported Realignment as a long-overdue course correction for a system that relied far too heavily on punitive approaches, especially incarceration. By taking prison off the table for lower-level offenders, Realignment gives public defenders the ability to secure acquittals or obtain appropriate community sanctions for more of their clients. They believe the state’s high recidivism rate was caused by its high
incarceration rate and that Realignment will result in better outcomes, particularly for low-level drug crimes.

Despite being pleased with the increased use of Day Reporting Centers, specialized courts, and other community alternatives flourishing under Realignment, public defenders did confess some concerns. The first involved the infrequent use of split sentences, a reflection of many defendants’ desire to do flat jail time. Aware that the jails are crowded, offenders know they will be released after doing a fraction of their sentence, and thus avoid further monitoring and the probation conditions that go along with it. Several public defenders were worried, too, about the long-term implications for recidivism reduction if offenders continue to eschew probation in favor of straight time. They want their clients in programs that help them confront their criminogenic problems and reduce the chance they will reoffend, but defendants tend to view things from a more short-term perspective.

Public defenders also identified a chasm between the ideal of Realignment and its reality in many counties, noting that treatment was either unavailable or not intensive enough for the most serious offenders. All of those interviewed agreed the most critical needs were services for sex offenders and the mentally ill, as well as housing and crisis beds.

Finally, public defenders said they lacked sufficient resources to handle their increased workload post-AB 109. Already stretched thin by oversized caseloads, public defenders have been overwhelmed by new responsibilities, mostly undertaken without sufficient new funding under Realignment.

As for prosecutors, they seemed less supportive of Realignment than any other group of stakeholders. While they expressed a willingness to work within the new framework, and acknowledged occasional feelings of cautious optimism, they also shared a strong sense of frustration throughout our interviews. Among their misgivings was the perception that taking prison “off the table” for some very serious, repeat offenders had resulted in less deterrence, less incapacitation, and ultimately less public safety. The police arrest, the detectives investigate, the district attorney files and makes the case, the judge passes sentence, and then, under Realignment, the final outcome of this tremendous resource expenditure is that the offender may get a very short stint in county jail, the prosecutors lamented. Moreover, crowding is forcing early releases from jail. Riverside County Sheriff Stan Sniff said 7,000 inmates were released early in 2012 due to a lack of beds. One prosecutor likened it to a “get out of jail free card” and another said felons were increasingly in a “zone of no consequences.” This sense of a poor sentencing payoff was expressed not only by district attorneys but also by police and judges.

Steve Cooley, three-term former Los Angeles County District Attorney, was perhaps the most vocal in his criticism, calling Realignment a “public safety nightmare.” Like Cooley, most prosecutors believe that Realignment undermines their ability to keep dangerous offenders off the streets--both newly convicted felons and former parolees. By taking the big hammer of prison out of prosecutors’ hands Realignment has made negotiations more difficult, leaving district attorneys with weaker bargaining positions and forcing them to agree to plea bargains carrying shorter sentences.

Prosecutors cite AB 109’s handling of offenders who commit “technical” violations as another key
deficiency of the bill. A technical violation of probation or parole is misbehavior by an offender under supervision that is not by itself a criminal offense (e.g., testing positive for drug or alcohol use, contacting a victim, failure to attend treatment). Under Realignment, virtually no technical violator can be returned to prison, a major change from the days when the state parole board sent about 35,000 such violators each year to prison for up to a year. Now, courts must handle the hearings for suspected technical violators, and the most serious penalty is a 180-day jail term, even for those whose backgrounds include serious crimes. As a result, prosecutors said repeat offenders were cycling through the system much more often, and that they must charge serious transgressions as new crimes in order to ensure a dangerous offender receives prison time. Between July 1, 2013 (when the state transferred the revocation process from the state Board of Parole Hearings to the County Superior Courts) and December 20, 2013, there have been over 33,100 parole violations. Out of these violations, only 4,000 (12%) have resulted in a parole petition to the Court requesting revocation to state prison. All other technical violations (29,000 as of January 2014) must be handled locally. Some prosecutors wondered whether Realignment would turn out to be a Faustian bargain, a deal done for present gain without regard for future costs or consequences.

While all prosecutors noted shortcomings of AB 109, some also believe it can spawn needed change and innovative strategies. San Francisco District Attorney George Gascón says Realignment has freed him up to accomplish things not possible under the old state-dominated correctional system. Realignment, he said, challenges those in the criminal justice system to think differently and find new policy solutions to hold offenders accountable and help reduce recidivism. A key virtue of Realignment rests on classic economics: it requires counties to internalize the costs of conviction and sentencing made at the county level--costs previously externalized on state prisons and parole agents. Gascón created a new position, an Alternative Sentencing Planner, to help prosecutors determine which punishment best fits offenders. He also created California’s first-ever county Sentencing Commission, which analyzes sentencing patterns and outcomes and will suggest sentencing changes to enhance public safety and offender reentry.

In Los Angeles, the newly elected District Attorney, Jackie Lacey, also expressed a moderate view of Realignment. While acknowledging the serious challenges in the sprawling county, Lacey said, “We’ve run out of room at the state prisons. We have run out of room at the county jail. . . . Let’s peel the lower-risk people off and save room for people who are very dangerous.”

C. Police

Police officers walking the beats in cities across California had few positive comments about Realignment. They considered it an unfunded state mandate, imposed on them at a time when they were already facing budget cuts that had led to officer layoffs and expanded obligations. Moreover, unemployment remains high and the fiscal crisis that began in 2008 forced budget cuts in California’s social services--the very services offenders need. As Sacramento Police Chief Rick Braziel put it:

Sacramento had a three-year reduction in crime, but now we’ve seen a 21 percent increase in violent crime--from assault with a deadly weapon all the way up to
homicide--compared to last year. . . . We don’t see that trend changing, and we expect it to get worse as we see more and more prisoners getting out without supervision, without services, and without jobs. Even if a released prisoner wants to turn his life around, there’s no support system.

California’s long-term crime decline is reversing, and police said Realignment is to blame. During our interviews, police continually warned of crime increases, and academic studies now confirm their views. A recent study by the nonpartisan Public Policy Institute of California (PPIC) found that crime rates increased significantly during the first year of Realignment (from 2011 to 2012). Property crime continued to drop nationally, but in California it rose nearly 8%, and California’s property crime increases were higher than the increases in states whose crime trends were similar to those of California before Realignment. Violent crimes in California also increased by 3.2% in the first year after Realignment, but that increase closely tracks national trends and closely matches the rate of increase experienced by other states that had similar crime rates to California before Realignment. The report finds there is “robust evidence that realignment is related to increased property crime. . . . In particular, we see substantial increases in the number of motor vehicle thefts, which went up by 14.8 percent between 2011 and 2012.” Police said they did not need an academic study to tell them what they already knew: more criminals are on the streets and crime is rising as a result.

In addition to coping with rising crime, police said they now have fewer options to control offenders’ behavior. When an arrest is made in some counties, offenders are quickly released due to jail crowding. From the police point of view, this means officers have invested valuable resources and completed abundant paperwork with little perceived benefit. Police expressed frustration not only with newly convicted felons being sentenced to jail and promptly set free--“they beat me home,” one officer said--but also with the handling of parole violators, who now face few consequences for breaking supervision rules. Police said offenders appeared to be getting bolder as the penalties grew weaker. The revolving door of state prison has become the revolving door of county jail--and it swings faster.

Municipal police agencies provide service to more than three out of four Californians, and their officers make almost two-thirds of all felony and misdemeanor arrests in the state. Despite the importance and reach of these local crime fighters, the potential impacts of Realignment on policing were not well examined by planners, and police departments have not been fully compensated for the extra work AB 109 requires of them. Struggling to cope, many police officers expressed anger and said their concerns had been overlooked.

Specifically, they said Realignment threatened recent progress made through community policing and other problem-solving techniques designed to proactively address crime--strategies they believed had led to California’s crime decline over the past few decades. Stretched thin, police departments reported that they can no longer engage in such efforts and, in some cases, no longer respond to calls reporting lower-level crimes.

By far the largest concern expressed by police was the need for a statewide, centralized database of all
the newly-realigned offenders. In the past, an officer who stopped a suspect could check the state parole
database quickly to determine his status--and conduct a legal search if the suspect was a parolee. That
extra authority often meant the difference between a routine traffic ticket and a drug bust. Now, officers
lack that tool, which they said had seriously eroded their effectiveness in controlling crime and
apprehending criminals.

D. County Sheriffs

California’s sheriffs are responsible for running the county jails, but their role under Realignment
extends far beyond custody and basic crime control. As jails have become more crowded with AB 109
offenders, and as both funding and the need for community alternatives have increased, sheriffs have
become central figures in offender treatment. In some counties, they are making decisions about who
should remain in custody, who should be released pre- and post-conviction, and what community
services and sanctions an offender receives, both initially and in response to a technical violation of
probation or parole. Many sheriffs are even running their own work release and electronic monitoring
programs, very similar to the programs run by probation. Ironically, if the state had given the same
discretionary release authority and “relief valve” to prison officials to control inmate populations,
California might have avoided the Plata litigation that ultimately led to AB 109.

Sheriffs were divided over the impacts of Realignment. Despite their concerns about glitches and
unanticipated consequences, many sheriffs acknowledged that the old system was not working well, that
the revolving door between jail and prison was not protecting the public, and that a new approach was
needed. As such, sheriffs said they were working more closely than ever with probation departments to
develop alternatives to custody so they can keep jails at a constitutionally acceptable capacity. They also
are joining forces to create a fuller menu of appropriate treatment, following the principles of evidence-
based practices. Sheriffs said they understand the potential benefits of community-based sanctions and
services. Orange County Sheriff Sandra Hutchens echoed what we heard from many, noting that, “they
are coming home anyway . . . they are our citizens . . . we have seen them before . . . let’s see if we can’t
do something different this time.” Collaborating with probation, some sheriffs have created a full
continuum of sanctions, ranging from fines to county jail and onto electronic monitoring and discharge.
Some questioned this expanded role for law enforcement, but others seemed enthusiastic about the
countywide approach.

One key challenge faced by sheriffs is the deterioration of jail conditions as populations swell to
accommodate diversions from state prisons. In the quarter preceding the start of Realignment, the
average daily jail population was 71,293 but by yearend 2012 it reached 80,136, an increase of
approximately 11%. California’s large and abrupt change in jail inmates has impacted national statistics.
The increase in the national jail population between midyear 2011 and midyear 2012 was 8,923 inmates.
According to the U.S. Bureau of Justice Statistics’ estimates, 85% of that increase is attributable to
California jails.

Because jails are typically not well equipped to house people for extended periods, the increase in
individuals serving long sentences in jails was a concern of many stakeholders. In interviews with public
defenders, the one consistent concern was that some clients were suffering in deplorable jailhouse
conditions. In particular, some offenders needing mental or medical care have waited weeks before
receiving any treatment. Indeed, in talking with jail inmates about such conditions, we found a
surprising twist: many offenders, particularly those facing long terms, would prefer to do their time in
prison. One reason is that in jails plagued with overcrowding, sheriffs often feel the only option to assure
inmate safety and prevent violence is to keep more inmates in lockdown. In the most crowded jails, they
are also converting any available space to house inmates. Santa Barbara County recently released a
report showing its jail was so cramped for space that part of the jail’s basement was converted into
inmate housing to provide fifty more beds. As a result of jail crowding, fewer offenders have access to
rehabilitation programs and extreme idleness is a problem.

Many sheriffs noted an increase on inmate-on-inmate assaults since AB 109. A recent Associated Press
study confirmed their impressions. That study found that “county jails that account for the vast majority
of local inmates in California have seen a marked increase in violence since they began housing
thousands of offenders who previously would have gone to state prison.” They looked at data from the
ten counties that account for 70% of California’s total jail population and found a surge in jail violence
(both toward other inmates and staff) in the year following AB 109. Los Angeles County, the largest jail
system in the U.S., experienced a 44% increase in inmate-on-inmate assaults last year compared to an
increase of 21% in its inmate populations.

Simultaneously, CDCR saw a 15% drop in inmate-on-inmate assaults within state prisons, while attacks
on employees dropped 24% as the prison population dramatically declined. In Fresno County, where
inmate-on-inmate fights have increased 48% since Realignment, Fresno County Assistant Sheriff Tom
Gattie observed, “The violence is just being transferred to the local facilities from the state system.”
Many sheriffs observed that Realignment makes the county jail system more like a prison, with more
serious inmates serving longer than a year in a facility not built for that purpose.

Orange County also reported a marked increase in contraband and gang activity in the jail since
Realignment began, and a recent Grand Jury Report confirms these impressions. County officials’
hypothesis is that the sophistication of the AB 109 population accounts for the increase. They believe
offenders are intentionally getting “flash incarcerated” (i.e., ten days jail time for technical violations) so
they can enter the jail, deliver contraband, and connect with gang members, knowing that they will be
released in a number of days.

Some of these conditions seem startlingly familiar, closely mirroring the problems that produced the
successful claim in Plata that state prison conditions violated the Eighth Amendment. Has Realignment
simply moved these constitutional violations from the state prisons to the county jails? Could the health
care problems that led to Plata morph into county-level versions of the state problem? Currently, thirty-
seven of California’s fifty-eight county jails are operating under either a self-imposed or court-ordered
population cap. Given the success of the Plata litigation, a surge of county-level Eighth Amendment
suits is likely to emerge. The Prison Law Office has already filed class action lawsuits seeking to remedy
Eighth Amendment violations in the Fresno County and Riverside County jails. Sheriffs are trying to
intervene early and address jail conditions before the courts become involved.

New funding provided by the State (AB 900) will help, providing twenty-one of California’s fifty-eight counties with dollars for jail construction--enough to add about 10,926 beds. But construction takes time, and no new jails will be completed before 2015.

Some projections show that by year-end 2017, California will have nearly the same number of inmates in correctional custody (jail plus prison) as it did before Realignment. If that proves true, Realignment will not have reduced California’s overall incarceration rate but will have only changed the place where sentences are served (i.e., jail instead of prison). But the shift from prison to jail may still be a positive development if jails are better able to deliver locally-based treatment programs and connect offenders to family and jobs, bringing down their recidivism rates. Progressive sheriffs are using their state jail construction funds to build a different type of jail, one that has space for more programming with an eye towards reentry planning. Santa Barbara County Sheriff Bill Brown, for example, is building a new $80 million state-funded jail. But instead of building a traditional brick-and-mortar jail, he is using this as an opportunity to rethink how the physical space can better used to foster offender reentry. He is considering a Reentry Pod where the last months of jail are spent learning job and living skills, and reconnecting with family and community organizations that can assist after release.

Meanwhile, many sheriffs have become highly creative in managing their release authority under Realignment, using risk assessments, and operating their own work furlough programs, electronic monitoring systems, and day reporting centers. Sheriffs also said they are using good time credits and flash incarceration for probation violators. By necessity, their expanded duties under Realignment have turned these elected law enforcement leaders into treatment providers, probation managers, and reentry coordinators. For sheriffs in counties rich in resources and with jail beds to spare, Realignment has been an opportunity to expand and create innovative programming, apply evidence-based practices to reduce recidivism, and absorb a population that they firmly believe is best managed at the local level.

**E. Judges**

Judges’ opinions regarding Realignment varied widely. All of those interviewed voiced frustration that AB 109 was poorly drafted, was undergoing continual revisions, and, given its 800-page length and multiple amendments, required extensive judicial training. Most judges agreed that it would have made more sense to test Realignment on a smaller scale before rolling it out statewide, especially given the lack of time for preparation and planning. Summing it up compellingly, Los Angeles County Judge David Wesley said adjusting to Realignment was “like trying to change the tires on the bus while the bus is moving.” All judges also expressed concerns about the added workload under AB 109, particularly given their new responsibility for nearly all parole, probation, and PRCS revocation hearings.

Some judges were strongly opposed to Realignment's new mandates, saying that instead of individualizing sentencing, as intended, AB 109 had done just the opposite. While the judge imposes the final sentence, the actual sentence served is now more a function of jail capacity. Other judges,
particularly those accustomed to drug courts and other collaborative courts, shared probation’s more positive view of Realignment. These judges have experience working with probation and community treatment specialists to provide services to offenders with mental health, substance abuse, and domestic violence issues. They have seen evidence that investing in a holistic and intensive community approach, one that is more patient with relapses and not as quick to incarcerate, holds promise. Santa Clara County Judge Steve Manley, a highly respected jurist who presides over drug, mental health, and veteran courts, said Realignment opens the door for judges to not only impose sentences but to actively manage offenders’ treatment and compliance post-sentencing. Judge Manley said the coercive power of the court can play a significant role in offender recovery, exerting not just a punitive force but also a therapeutic one.

But collaborative courts are expensive, and not all judges favor them. Some said their counties could not afford to spend so much money on such a small part of their caseloads, noting that serious criminal work accounted for less than 15% of the total cases that came before them. In addition, some judges said their counties simply do not yet have the community-based resources to make such courts work, rendering Realignment appealing in principle but difficult to execute in reality.

One concern many judges shared was the lack of post-custody time and supervision that they could impose on an offender. They worried that they lacked sufficient discretion to ensure that criminals are both properly incapacitated and properly monitored when released. Some judges said the limitations of post-release community supervision do not allow enough time to change criminal behavior and reduce recidivism. For many counties, this situation has become a catch-22: Judges do not have faith in probation to deliver effective programs, so they sentence more and more inmates to straight time (i.e., jail without post-custody programs or supervision). As more straight-time offenders recidivate, probation may be blamed for ineffective programming. But research shows that probation is most effective when it combines custody and aftercare (i.e., split sentencing), and probation officials are not afforded that opportunity when offenders are sentenced to straight time.

Finally and importantly, judges pointed out that while AB 109 was designed to give judges more discretion and more flexibility to individualize sentencing, taking into account risk factors and community alternatives, it has not done that. Rather, AB 109 has undermined their discretion and shifted it outside of the courtroom and into the jails.

Most of the judges we interviewed felt that judicial discretion has been reduced while the sheriff’s discretionary authority has increased. Some judges said this increased authority of sheriffs threatens the concept of independent and impartial judges, and raises questions about due process and the separation of powers.

F. Victim Rights and Safety

Virtually every judge and prosecutor we spoke with was concerned about how victims were faring under AB 109. California has long been a national leader in the field of victim rights, and voters further
expanded these rights in 2008 when they approved Marsy’s Law, the California Victims’ Bill of Rights Act of 2008. It created seventeen distinct rights for victims, including the right to restitution from the offender, to confer with prosecutors, to receive notice of any proceedings related to the case (bail hearings, pretrial release hearings, plea agreement hearings), and to be heard at sentencing. Victims also have a right to be notified when their offender is up for parole or released from jail or prison custody. The state prison system had a rather well developed statewide system to notify victims of their offenders’ release and revocation; it was relatively easy with just one statewide system. The state computerized system recorded victim notification wishes and contact information. Judges say it is not clear how these victim rights are being protected post-Realignment. But offenders released from prison to county-level supervision are supervised by local law enforcement agencies, and CDCR no longer has jurisdiction over any person who is released from prison to county-level supervision. All of these procedures need to be recreated at the county level, and they have not been to date. The fifty-eight different county systems have little experience handling these issues, which may be allowing victim notification to fall through the cracks.

Judges also often order victim restitution, no contact restraining orders, and other special probation or parole terms that are designed to protect victim safety. As a greater number of offenders get discharged from supervision, it is unclear who is responsible for collecting restitution or assuring compliance with restraining orders. Crimes that involve fraud, property damage, or injuries caused by drunken driving, for example, often include payments to victims.

The state’s prisons had a seamless system for siphoning 50% of the money out of an inmate’s prison account—money earned from a prison job or deposition by family or friend—to pay victims for their losses. But now that the N3s are serving their time in county jails, the jails do not have either the in-custody work programs or the administrative structure to collect restitution. At first, county jails did not even have the authority under the Realignment law to take prisoners’ money for restitution, a loophole that took more than a year to close. Corrective legislation went into effect on January 1, 2013, giving the counties the authority to collect money from jail inmates, but with few work programs, unclear administrative procedures, and sheriffs preoccupied with crowding, our research found that collecting restitution often does not happen. If jailed inmates are released without any probation supervision, there is no mechanism to collect victim restitution when the offender returns to the community. Judges and prosecutors told us that a critical oversight of AB 109 was that no one addressed these victim issues.

There is even more urgency to address victim issues now that judges have taken over revocation hearings. Victims of alleged violations have a state constitutional right to attend hearings and present testimony. California law allows victims to provide victim impact statements and requires judges to consider those statements in making sentencing decisions. But judges said they are not sure who is giving victims notice of such hearings in case they wish to participate. With sheriffs now making jail release decisions more frequently, offenders are often being released without split sentences and without victim notification.

The CDCR had an automated system that allowed victims, family members of victims, or witnesses who testified against the offender to request to be notified of the release, parole hearing, death, or escape of
their offender. Under state parole supervision, there was also a statewide database for checking criminals’ status on the street. Local police chiefs are apprehensive because there is no similar statewide system for offenders on county probation.

California used to have some of the strongest victim rights of any state, but judges worry that AB 109 is diluting some of these long-fought-for legal rights. A few counties are trying to rectify these oversights; for example, the Calaveras County DA’s office is adding a new victims’ services program coordinator to its staff. But judges say that California’s victim rights are not being upheld under Realignment, and they anticipate litigation in this area.

**IV. Getting It Right: Stakeholder Consensus Recommendations**

In just two short years, Realignment has changed the face of California’s criminal justice system and everyone agrees that it is here to stay. County stakeholders are basically on board, as they know the previous system was failing on almost every dimension, and that a new approach was needed. Although most thought AB 109 was rolled out too fast and still needs major tweaks, those interviewed endorsed the law’s foundation, with counties accepting responsibility for lower-level offenders and the state handling the most serious and violent criminals. Surprisingly, nobody we interviewed said Realignment should be repealed.

But stakeholders felt that Realignment should not merely push state prison ills onto county governments and that the Legislature needed to urgently fix some major flaws. The most commonly recommended changes were to: (1) allow an offender’s entire criminal history and risk level to be considered when determining whether the county or the state will supervise a parolees; (2) cap county jail sentences at a maximum of three years; (3) permit certain repeated technical violations (e.g., violations of domestic restraining orders, sex offender restrictions) to be punished with a prison sentence; (4) create a statewide tracking database for offenders under state and county correctional supervision; (5) collect data at the individual- and county-level to determine what is working and what is not; and (6) require that all felony sentences served in county jail be split between jail time and mandatory supervision, unless a judge deems a split sentence unnecessary.

The Legislature and Governor Brown seem to be listening. In 2013, California State Senator Ted Lieu became particularly concerned with the number of sex offenders who were cutting off their electronic monitoring devices and facing few consequences (since technical violations could not be returned to prison). In explaining the need for new legislation, Lieu said:

> An increasing number of California parolees are cutting off their GPS monitoring devices because they’re convinced little will happen to them. . . . Cutting off an ankle bracelet is a parole violation, which can incur 180 days in county jail. When you count in the overcrowded county jails and other factors, sometimes they don’t serve any time, or sometimes just a few days.
Senate Bill 57 was signed into law by Governor Jerry Brown and requires convicted sex offenders who cut off their court-ordered GPS bracelets to be returned to jail for a minimum of 180 days. SB 57 went into effect January 1, 2014. Of course, such mandatory penalties, while perhaps warranted, could worsen jail crowding.

In January 2014, State Assembly member V. Manuel Pérez introduced the Realignment Omnibus Act of 2014 (Assembly Bill 1449) to incorporate this study’s first three major recommendations. Attorney General Kamala Harris is working with law enforcement officials to establish a statewide offender database and recently launched the California Recidivism Reduction and Re-Entry initiative to disseminate best practices. And on January 9, 2014, Governor Brown released his proposed state budget for 2014-15 and included several of the Realignment changes practitioners were hoping for. According to the Sacramento Bee, the budget proposes $500 million more for jail facilities to ease overcrowding, provides an additional $100 million for court operations to support the expanded duties of the judiciary under AB 109, and importantly, proposes legislation to require county jail felony sentences to be split between incarceration and mandatory supervision, unless the court finds it in the interest of justice not to do so.

That last item is extraordinarily important. Though AB 109 gives the Courts the power to split sentences, some judges have declined to do so. If passed, this provision creates a right to a split sentence (unless the court makes a special finding), releasing offenders to the supervision of Probation and optimally involving them in rehabilitation programs that will help reintegrate them into the community. To support expanded community supervision, the proposed budget expands funding for mentally ill offenders, and county substance abuse and reentry programs. And to ease the challenges that long-term inmates are posing for sheriffs, inmates sentenced to more than ten years in county jails under Realignment would again serve their time in state prison.

These recommendations and budget adjustments should reduce the burdens Realignment has placed on the counties, and allow them to concentrate on those offenders evidence has shown to be most amendable to evidence-based programs. Most county officials believe Realignment can work--if the state will work with them to tweak the flaws in the original legislation. And now that the Court has given California two more years to fix its prison crowding problem, counties are more optimistic about long-term criminal justice reform.

V. Conclusions

Over the two years since Realignment began, California’s justice system has changed in ways that are unprecedented in both depth and scope. The reallocation of responsibility across the major components of California’s corrections system has been nothing short of remarkable, as thousands of individuals have been shifted from the state’s jurisdiction to counties’ jurisdictions. Only time will tell whether California’s Realignment experiment will fundamentally serve as a springboard to change the nation’s overreliance on prisons. It is an experiment the whole nation is watching.
On August 12, 2013, Attorney General Eric Holder delivered the keynote address to the American Bar Association meeting in San Francisco. He announced that the federal government was committed to reducing the nation’s bloated prison population. He directed all federal prosecutors to exercise more discretion toward the harsh sentencing of low-level drug crimes. At the time of his speech, 47% of all inmates in the Federal Bureau of Prisons were held on drug offenses. Mr. Holder said, “We need to ensure that incarceration is used to punish, deter and rehabilitate—not merely convict, warehouse and forget.” He urged new approaches for the handling of lower-level drug offenders whom he said were “best handled at the local level.” He directed federal prosecutors across the country to develop new guidelines and programs to divert prisoners to community sanctions instead of prisons.

Given that his speech was given in San Francisco, it is surprising that the Attorney General did not use the opportunity to look into the future using California’s experiment in prison downsizing to see how such a program might play out. Just 8.7% of California’s prisoners are now held on drug crimes, down from 20% in 2005. California has cut the number of prisoners in state facilities for drug convictions in half during the last two years.

It is one thing to urge prison downsizing, but such pronouncements will be hugely counterproductive if policymakers act without giving serious thought to how communities will deal with all the offenders who are released. The United States has “ downsized” before--just recall the disastrous consequences of the nation’s deinstitutionalization of the mentally ill. It is easy to implement policies of no-entry that drive down incarceration rates. California has done that. The much harder challenge is to increase prisoner re-entry. California is just starting to work on that.

The criminal justice system is complicated and has a lot of moving parts, and actions in one part of the system can cause unanticipated and harmful effects elsewhere. The stakeholders interviewed here, and the lessons California is learning about the impacts of downsizing the nation’s largest prison system are hugely instructive.

Realignment represents an extraordinary policy shift and opportunity for reform, but the devil will be in the details. It will only produce true and lasting reform if counties are able to make it work. If we fail to listen to these expert “voices from the field,” we will likely misstep. If we listen and follow their on-the-ground experiences and advice, we might just begin--step-by-step, decision-by-decision--to create a criminal justice system that better protects victims, does not overburden taxpayers, and facilitates offender reintegration back into society.
Dirk Van Zyl Smit, Regulation of Prison Conditions, in Crime and Justice: A Review of Research 503 (Michael Tonry, ed., Univ. of Chicago 2010)\(^1\)

Prisons are closed institutions. They are established and funded by governments to hold people against their will. In the case of sentenced prisoners at least, this loss of liberty is a deliberately inflicted punishment. Prisons are supposed to protect society, immediately by keeping their inmates, the prisoners, out of the wider society, and, ideally, by eventually returning them to society as citizens who will lead crime-free lives. In the process of imprisonment the prison authorities exercise direct and enormous power over those who are imprisoned. This power shapes the conditions under which prisoners are held. These conditions not only determine the quality of prisoners’ lives but may also literally be a matter of life or death for them. Regulating prison conditions is therefore of prime importance both for prisoners and for society as a whole, which also has a wider interest in the efficacy of prisons.

At its best, concern about prison conditions is motivated by the recognition that prisoners as human beings have a right to dignity that should be recognized notwithstanding their incarceration. Regulation of prisons may seek to determine whether prison conditions are such that prisoners can live in prison in a way that allows them to survive with their dignity and humanity intact and, ideally, improve themselves in the process. However, prison conditions may also be regulated for other reasons: the government may wish, for example, to ensure that the resources that it is putting into prisons are being spent appropriately. It may even want to ensure that prison conditions are not “too soft,” so that prisoners are not having “too easy a time.” Regulation may also attempt to determine whether conditions in prisons are preventing escapes or providing prisoners with opportunities for “resocialization.”

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In order to reflect on and compare the regulation of prison conditions around the world it is necessary to have a conceptual framework for describing the very different regulatory techniques that have been developed. One relatively simple framework is to recognize, as the 2006 European Prison Rules (EPR) do, that, broadly speaking, this regulation has taken two primary forms. The first, the internal form, has been one in which prisons are subject to controls similar to those over other institutions by comparable government departments. In this regard, the EPR refer to regular inspection by government agencies in order to assess whether prisons are administered in accordance with the requirements of national and international law. Second, regulation has taken the form of independent monitoring that is external to, and independent from, the prison or prison system that is to be regulated.

Such monitoring could be conducted by both national and international institutions. Both forms of regulation have several variations. They depend crucially on national administrative and legal systems and their relationship to national, as well as regional and international, forms of oversight. Internal regulation has largely been predicated on fundamental changes in state administration that have taken place in most countries, albeit at very different stages and to different degrees, since the rise of the modern prison system in Western countries two centuries ago. All forms of administration, including prisons, in modern bureaucratic states are subject to internal audits of expenses and performance that amount to far more intensive controls than were historically the case.

External monitoring may take various forms, which may have a great impact on its efficacy. It may be conducted by elements in the state administration that are only partly separated from the bureaucracy that is directly responsible for the prison system. Thus in most countries there are auditors or inspectors of some kind who report on conditions in individual penal institutions and on how they are administered. Typically they are not primarily responsible to a department of prisons or “corrections” but rather to either a minister of state or even directly to an elected parliament.

External monitoring, by contrast, may be conducted by bodies that are fully independent of the national administration. Such fully independent regulation can take several forms. It may be international and thus clearly separate from the national bureaucracy. This is the case if the monitoring is conducted by an agency or “special rapporteur” appointed by the United Nations or by a regional human rights agency that has a basis in international law to do so. However, as will become apparent, such monitoring is not available in all regions of the world and in any event may not be permitted by a particular national government.

A measure of independent and external monitoring may come from nongovernmental organizations that are not elected but nevertheless form an important part of the pluralist fabric of modern democracies. In this regard one must bear in mind the role that is played by both international nongovernmental organizations, such as the International Committee of the Red Cross (ICRC), Amnesty International, and Penal Reform International, and by national
nongovernmental organizations, such as the Howard League in both New Zealand and the United Kingdom. Nongovernmental organizations may regulate prisons directly by inspecting them and making policy recommendations on prison conditions. More often, however, they operate as a pressure group or “public conscience” to encourage government or other bodies to perform their regulatory functions.

External monitoring of prisons may also be conducted by the courts, both international and national. It is important to recognize this role, as some sociological literature on prison regulation focuses on (improved) means of administrative control but ignores the important effects that the judicial branch can have directly and indirectly on prison conditions. However, the place of the courts in the regulation of prison conditions can vary considerably, depending on their structural role in prison-related decision making, deeper national constitutional traditions, and, in the case of international and regionally based courts, the degree of recognition their judgments have in national law.

Analysis of techniques of regulation cannot be separated entirely from the question about the substantive conditions that prisons can be expected to meet and that regulation, both internal and external, aims to ensure. Here too, there are variations between countries both in the standards themselves and in the sources from which they are derived. These variations have to be borne in mind when analyzing how techniques of regulation are implemented.

Historically, much of the drive for prison regulation has been motivated by concern for the protection of the human dignity of prisoners. Exposés of prison conditions, from John Howard (1792) onward, have been driven by a concern for the humanity of prisoners held under “appalling” conditions and have been followed by calls for establishing mechanisms and forms of regulation that would ensure that such conditions would be outlawed. The idea of substantive standards that prisons should meet has deep roots in the right not to be subject to certain forms of punishment that can be described as “cruel and inhuman” or, latterly, as torture or “inhuman or degrading” punishment or treatment.

These ideas were found in the English Bill of Rights of 1688, and the amendments to the Constitution of the United States of America and the French Déclaration des droits de l’homme et du citoyen a century later. However, their emergence into recognizable standards that could be enforced by regulation backed by law is very much a product of the post–Second World War period, in which the recognition of prisoners as bearers of human rights became much more prominent at both the national and international levels.

This essay aims to shed light on how the regulation of prison conditions is achieved in modern prison systems by describing what is known about key aspects of such regulation in a number of countries. The approach adopted is both indirect and selective. It is indirect in the sense that in Section I it outlines the emergence of substantive standards for prison conditions at the international and regional levels and then turns to their international implementation as a
means of regulating prison conditions at the national level. The effects of international standards on the regulation of national prison conditions are distinctly mixed, for they are only one element, and not necessarily the most important one, in the regulation of prison conditions. . . .

I. The International Dimension

At the international level it was the growing recognition of human rights, including the rights of prisoners, in the period after the Second World War that led eventually to the creation of an international apparatus to regulate prison conditions. There have been several stages in this process, which, arguably, is still far from complete.

A. International Human Rights

The first stage was the rise of international human rights law and in particular the affirmation of the right to be free of torture and of cruel, inhuman, or degrading treatment or punishment, which came to be seen as an element of the right to human dignity, an explicit principle of international human rights law. Thus, as early as 1948, article 1 of the Universal Declaration of Human Rights recognized human dignity, while article 5 outlawed torture and cruel, inhuman, or degrading treatment or punishment. At the international level, human dignity and the prohibition of torture and cruel, inhuman, and degrading treatment or punishment were given significance as concepts underpinning the regulation of prison conditions by the ICCPR and CAT, adopted in 1966 and 1984, respectively. Of these, the former was arguably most important in terms of the recognition of prisoners’ rights, which could only be achieved if adequate prison conditions existed. Not only did it provide that “all persons deprived of their liberty shall be treated with humanity with respect for the inherent dignity of the human person” (art. 10.1) and that “no one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment” (art. 7), but it also contained further provisions that could be interpreted as setting implicit requirements in respect of prison conditions. The most interesting of these is the requirement in article 10.3 that “the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their social rehabilitation,” which can been seen as an overarching requirement according to which the treatment of all sentenced prisoners and the prison conditions to facilitate it should be judged (Nowak 2005). Article 10 also contains references to how unconvicted and juvenile prisoners should be treated.

States that are parties to international treaties of course undertake to uphold them, although how this is done may vary according to their national constitutional relationship to the domestic implementation of treaty obligations. Moreover, both the ICCPR and the CAT provide mechanisms designed to ensure that they are enforced. Key to these is a system of reports by states parties on the steps they were taking to ensure compliance with the treaties. Such reports are made to the treaty bodies composed of independent experts, the Human Rights Committee and the Committee against Torture, respectively. However, as mechanisms for regulating prison conditions, these face two key difficulties. First, the treaties on which they
are based do not spell out what prison conditions are required to meet the obligations they create, and second, the powers of the treaty bodies charged with compliance may not be adequate to develop and enforce at the international level regulatory controls of prison conditions.

In practice, the first difficulty has been met largely by relying on the 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners and, to a lesser extent, on the subsequent Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and Basic Principles for the Treatment of Prisoners. These instruments, particularly the first, contain provisions relating to substantive prison conditions, which, if fully enforced, would go some way toward setting clear standards against which prison systems could be judged. Although these instruments are “soft” international law and therefore, unlike treaties, not directly binding on states, the Human Rights Committee in particular has referred to them when interpreting the ICCPR, which does have treaty status. It has done so in its evaluation of national reports on compliance with the ICCPR, in its general comments on article 10 of the covenant, and in its response to individual petitions by prisoners who claim that their human dignity is being infringed or that they are subject to illegal treatment or punishment under the covenant. The result is that the United Nations Standard Minimum Rules for the Treatment of Prisoners in particular has grown in status to the point where it is recognized that “some of their specific rules may reflect legal obligations” (Rodley and Pollard 2009, p. 383). Thus, for example, the prohibition on placing a prisoner in a dark cell (Rule 31) is seen as a form of treatment that is specifically forbidden and therefore routinely regarded as a form of the cruel, inhuman, or degrading treatment outlawed by article 7 of the ICCPR.

Even where this is not the case, Standard Minimum Rules can provide guidance in interpreting the general guidance in applying the ICCPR to prisoners. That there are secondary legal instruments dealing with prison conditions at the international level, which can be linked to international treaties, does not make them into an effective international regulatory framework with real impact on national prison conditions. The reality is that both the ICCPR and the CAT were adopted during the period of the Cold War, when major states were extraordinarily leery of any form of international regulation that would infringe on their sovereignty or that could make negative findings about them that could be used propagandistically to discredit them (Nowak 2005). The result was that the enforcement mechanisms that they adopted are relatively weak. Both treaties provide for states parties to submit national reports on their enforcement, and procedures for interstate and individual complaints. In both instances, however, the individual complaints procedures are optional, in the case of the ICCPR by way of accession to an additional protocol. Many of the states that have acceded are in Europe or the Americas, where there are regional human rights instruments that may take precedence. In the case of the CAT in particular, only a minority of states have provided this facility to their citizens, and the impact on the regulation of prisons has been very limited (Nowak and McArthur 2008).

More states allow their citizens a right of individual complaint to the Human Rights Committee. It has been more active with respect to individual complaints and has dealt more
frequently with prison matters, to the extent that it is possible to determine its views on key prison conditions, such as sanitation, light, ventilation, and overcrowding. Serious deficits in this regard have been held to infringe both article 10 requirements that prisoners must be treated with humanity and dignity as well as article 7 prohibitions on ill treatment (Williams 1990; Nowak 2005, pp. 172–75; Conte and Burchill 2009, pp. 124–51; Rodley and Pollard 2009). In some instances the Human Rights Committee has ordered legal or policy changes, and, in findings that closely parallel legal judgments, it has declared that reparation should be made to individuals whose rights have been infringed. However, the difficulty remains that even a finding that a state has breached its obligations, either in a specific case or on the basis of analysis of national reports, is not legally binding. The best that the Human Rights Committee can do in practice is to appoint a special rapporteur to follow up, but, as a majority of states found to be in violation of the committee’s views either challenge the findings or simply ignore them, it is relatively powerless. The Human Rights Committee too cannot be regarded as an effective agent for the systematic regulation of prison conditions. Much the same can be said about the systematic impact of other United Nations regulatory initiatives that relate to prison conditions.

The position of Special Rapporteur on Torture was created by the United Nations Commission on Human Rights in 1985. The mandate of the Special Rapporteur, who is appointed directly by resolution of the Human Rights Council (the successor to the Commission on Human Rights) covers all countries, irrespective of whether a state has ratified the CAT. The Special Rapporteur acts by transmitting urgent appeals to states with regard to individuals reported to be at risk of torture, as well as communications on past alleged cases of torture, and by undertaking fact-finding visits to countries. These can and do include visits to prisons. The Special Rapporteur can request invitations to visit countries or invitations might be unsolicited. Not all countries issue invitations on request, but, when they do, they undertake not to place restrictions on the Special Rapporteur’s access to persons deprived of their liberty. The current Special Rapporteur, Manfred Nowak, has spoken eloquently of the importance that visits have in influencing prison conditions:

Preventive visits to places of detention have a double purpose. The very fact that national or international experts have the power to inspect every place of detention at any time without prior announcement, have access to prison registers and other documents, are entitled to speak with every detainee in private and to carry out medical investigations of torture victims has a strong deterrent effect. At the same time, such visits create the opportunity for independent experts to examine, at first hand, the treatment of prisoners and detainees and the general conditions of detention. The manner in which a society treats its prisoners and detainees, including aliens, is a major indicator of the commitment of such a society to human rights in general. Many problems stem from inadequate systems which can easily be improved through regular monitoring. By carrying out regular visits to places of detention, the visiting experts usually establish a constructive
dialogue with the authorities concerned in order to help them resolve problems observed.

Based on his experience as head of an expert commission carrying out regular visits to police detention centres in Austria and from fact-finding missions in his capacity as United Nations Special Rapporteur on the question of torture, the Special Rapporteur is deeply convinced that a system of unannounced visits to all places of detention by independent experts is by far the most effective and sustainable mechanism for gradually developing a prison culture based more on respect for human dignity and personal integrity than on fear, exclusion and contempt.

B. Regional Initiatives

Regional initiatives to reinforce the recognition of human rights at a level beyond that of the nation-state also emerged, in Europe and elsewhere, in the immediate post–Second World War period. In 1950, article 3 of the ECHR prohibited torture and inhuman or degrading treatment or punishment. In 1969, article 5 of the American Convention on Human Rights too confirmed the importance of treating all persons deprived of liberty with human dignity and prohibited torture and cruel, inhuman, or degrading treatment or punishment. Finally, in 1981, article 5 of the African Charter on Human and Peoples’ Rights prohibited all forms of exploitation and degradation, among which it also specifically included torture and cruel, inhuman, or degrading punishment and treatment. An important exception is the Asia-Pacific region, which does not have similar binding regional human rights instruments to prohibit torture and other abuses against prisoners (Pasha 2010).

1. Europe. The ECHR was supported by the Council of Europe established in 1949, with a general brief to encourage the recognition of human rights in Europe, and by the European Commission of Human Rights and ECtHR, as the mechanism for enforcing the convention among member states. Imprisonment was not initially high on the agenda, and it was not until 1975 that the ECtHR gave its first major decision on prisoners’ rights (Golder v. United Kingdom [App. No. 4451/70 (1979–1980) 1 EHRR 524 (February 21, 1975)]). Other specifically European initiatives dealing with prison conditions also took time to develop. In 1973, the Committee of Ministers of the Council of Europe adopted a fresh set of specifically European, Standard Minimum Rules for the Treatment of Prisoners and followed this with further resolutions and recommendations dealing with specific aspects of imprisonment. However, these early initiatives could not be regarded as constituting anything like a binding European framework for the regulation of prison conditions.

Much of this changed with the adoption in 1987 of the ECPT. It grew directly out of dissatisfaction with the slow process of adopting an enforceable United Nations Convention against Torture and the desire to ensure that the prohibition against torture and other prohibited
forms of treatment could be enforced by an international body that conducted regular inspections. The ECPT did not create any new rights. It simply established the CPT and laid down that it “shall by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment” (art. 1). The CPT is composed of independent experts elected for a 4-year term by the Committee of Ministers of the Council. The reports on the visits are confidential but can be published at the request or with the consent of the country concerned. If a state does not cooperate with the CPT or systematically does not follow its recommendations, the CPT may publish a statement about its key findings and recommendations without the consent of the state concerned. In practice, as the countries that were first visited all consented to the publication of their reports, the moral pressure to publish is high. As a result, most CPT reports are published together with the responses of the member states (Cassese 1996; Van Zyl Smit and Snacken 2009).

The independence of the CPT follows from the circumstance that its members, one for each state party, do not represent their countries but are experts in one of the fields of the CPT’s competence and are not involved in visits in their own country. Its effectiveness results from its ability to receive important information and react quickly to it, both through the procedure it has developed for giving short notice of its visits if necessary and by following up on its recommendations through periodic and ad hoc visits (Snacken 2004). Examples of the latter include a visit to Frankfurt Airport from May 25 to May 28, 1998, to investigate allegations that asylum seekers were being subjected to degrading conditions of detention, and a visit on January 26 and 27, 2010, to the Turkish Island of Imrali, where Abdullah Öcalan, arguably Turkey’s most famous political prisoner, is being detained.

The importance of the CPT was greatly increased by the major political events of the early 1990s. After the fall of communism in Eastern Europe, all European countries, with the exception of Belarus, became members of the Council of Europe. As a condition of membership, European governments tend to respond in some detail to the reports of the CPT. Usually they comment on the steps that they have taken to implement reforms. Thus, for example, the government of Lithuania informed the CPT that it has amended its legislation to bring it in line with European human rights norms. In rare instances they do not respond at all: the Russian government, for example, has failed to respond to reports of prison conditions in Chechnya, thus eventually provoking a critical statement from the CPT. In other exceptional instances governments have disputed the findings of the CPT directly: in 2009, for example, the Czech government rejected outright the strong condemnation by the CPT of the castration of sex offenders in Czech prison and psychiatric institutions.
The CPT has also been prepared to expand its brief and address wider policy issues. Most notably it has argued that unacceptable prison conditions caused by overcrowding must be met by reducing prison populations, as building programs did not provide long-term solutions (Snacken 2006). While the CPT standards remain an important source of norms applicable to prisons, in the past decade the judgments of the ECtHR and the recommendations of the Committee of Ministers of the Council of Europe, particularly the 2006 EPR, have increased in significance as sources of these norms. In the case of the court, an initial reluctance to give judgments on issues dealing with substantive prison conditions, identified by Stephen Livingstone (2000), has all but disappeared. Although the court still warns that the level of unacceptability of prison conditions must reach a minimum level for it to be regarded as amounting to cruel and unusual treatment, it now routinely finds that overcrowding and other shortcomings in prison conditions infringe article 3 of the ECHR. (See, e.g., Dougoz v. Greece [App. No. 40907/98 (2002) 34 EHRR 61, March 6, 2001]; Kalashnikov v. Russia [App. No. 47095/99 (2003) 36 EHRR 34, July 15, 2002].) Moreover, the court has made it clear that lack of resources and lack of intention to infringe this right are not acceptable excuses for inhuman or degrading treatment of prisoners (Poltoratskiy v. Ukraine [App. No. 38812/97 (2004) 39 EHRR 43, April 29, 2003]; I.I. v. Bulgaria [App. No. 44082/98, June 9, 2005]). Other convention rights, including the right to a private and family life, have been developed into substantive prisoners’ rights that directly affect prison conditions (see, e.g., Enea v. Italy [App. No. 74912/01, September 17, 2009]).

The EPR and related recommendations have been developed too. They are now cast much more explicitly in terms that recognize the rights of all prisoners to certain prison conditions. Indeed, the updated “Basic Principles” at the start of the rules are explicit in this regard, with Rule 1 establishing that “All persons deprived of their liberty shall be treated with respect for their human rights” (emphasis added; note the positive, obligatory language). This approach may be contrasted with the EPR published in 1987, Rule 1 of which is formulated as a general obligation on the state rather than as an individual right. In addition, many of the rules of the 2006 EPR facilitate the continued exercise of human rights guaranteed by the ECHR: for example, in article 8 the right to respect for private and family life and for correspondence is facilitated by Rule 24, which requires states to provide a maximum level of contact with the outside world (at least as a general principle). Moreover, they provide specifically that there should be both national governmental inspection (Rule 92) and independent monitoring of prisons (Rule 93). They place a duty on independent monitoring bodies to make their findings public (Rule 93.1) and to cooperate with international agencies that are legally entitled to visit prisons (Rule 93.2).

A feature of the way that the ECtHR, the CPT, and EPR operate in Europe is the extent to which they reinforce each other. Thus the ECtHR relies on the EPR and other recommendations of the Council of Europe (as well as on the ICCPR, to which all European countries are parties) and increasingly cites them in detail as the “European legal instruments” when developing its
own conceptions of what prison conditions should be like. This has been done explicitly by the Grand Chamber of the ECtHR in recent years (see, e.g., Dickson v. United Kingdom 2007 [App. No. 44362/04 (2008) 46 EHRR 41, December 4, 2007, para. 29]). In Gulmez v. Turkey (App. No. 16330/02, May 20, 2008, para. 63), the ECtHR went further and ordered the respondent state directly to bring its legislation on prison discipline “in line with the principles set out in articles 57 § 2 (b) and 59 (c) of the European Prison Rules.” The ECtHR also often cites the reports of the CPT, both as a source of policy and as a source of factual findings when establishing the background situation of relevance to decisions in individual cases.

The wider question remains whether, considered separately or together, these bodies can be regarded as providing a mechanism for regulating European prison conditions that operates at the European level. In this regard Jim Murdoch (2006, p. 52) has commented: “The European system of the protection of persons deprived of their liberty is thus a complex scheme of interwoven standard-setting and implementation machinery which draws on international expectations and domestic practices and is given practical force through state goodwill and when necessary by the threat of judicial condemnation.” However, the fact that such a system can be identified (De Jonge 2007; Van Zyl Smit and Snacken 2009) does not necessarily mean that it is recognized throughout Europe as a key element in the regulation of national prison conditions. An evaluation of the impact of the European system as a whole has not been undertaken, and the best one can do is to comment on the impact of its constituent parts, as is done to some extent when individual countries are discussed below.

As far as the ECtHR is concerned, one would do well to distinguish between legal technicalities and practical outcomes. The ECtHR is not a European supreme court, and the enforcement of its judgments is dependent on a political process involving the Committee of Ministers of the Council of Europe. In practice, though, its decisions, including those to do with prisons, are, unlike those of the Human Rights Committee at the international level, rarely flouted directly by European states. Instead, also in the area of prison law, they are regarded as binding and, allowing for the very different constitutional and legal traditions of European states, as very strong precedents, if not formally binding in all cases. What does happen, however, is that national governments interpret, as restrictively as possible, judgments of the ECtHR of which they disapprove.

2. The Americas. Although the European system may have evolved most fully, developments in human rights law in other regions also affect prison conditions. One such development is to be found in the Americas, where the American Convention on Human Rights and the Inter-American Convention to Prevent and Punish Torture closely parallel the ICCPR and the CAT in their prohibitions on torture and inhuman or degrading treatment and punishment (Rodley and Pollard 2009, p. 51). Both are enforceable through the Inter-American Commission on Human Rights. The commission, a body established under a mandate in terms of Chapter VII of the American Convention on Human Rights, consists of seven independent experts from different member states of the Organization of American States (OAS). They are elected for a
term of 4 years from a short list composed of three candidates proposed by each of the member states of the OAS by that organization’s general assembly. Since 2000, the commission has considered cases involving prison conditions in a significant number of countries: Argentina, Brazil, Colombia, Peru, Paraguay, Mexico, Cuba, Jamaica, Guatemala, Ecuador, Surinam, Honduras, Venezuela, El Salvador, and the United States. In all these cases, the commission ordered the adoption of provisional measures to avoid serious and irreparable harm to the human rights of individuals deprived of liberty.

Some of these cases were later submitted by the commission to the Inter-American Court of Human Rights, a regional judicial body established in 1979 by the OAS to enforce and uphold the American Convention on Human Rights. The court’s adjudicatory jurisdiction extends only to cases referred by states or by the commission, and it requires the member state’s voluntary consent, which may be granted either for individual cases or absolutely. The court has also used its powers in terms of the American Convention on Human Rights to order the adoption of provisional measures to deal with major human rights abuses, such as the occurrence of multiple killings in prison as a result of prisoner riots.

By and large the general compliance with the provisional measures ordered by the commission and the court has not been satisfactory. It is common to find a statement by the commission or the court in which, even though the measures adopted by the state are welcomed, they are often not considered sufficient to guarantee the right to life and to safety of the detainees or are found to be ineffective. In Persons Imprisoned in the “Dr. Sebastián Martínez Silveira” Penitentiary in Araraquara, São Paulo v. Brazil (Inter-Am. C. H. R. [Ser. E] [2006], Order of the Court of September 30, 2006, p. 1347), the court quoted the commission as commenting:

that even after the Order of the President dated July 28, 2006, and while they were at the Araraquara Penitentiary, the beneficiaries remained in an open yard without the presence of any State officers to keep order. Many of them suffered from serious illnesses and medical conditions such as hepatitis B and C, ulcers, HIV/AIDS, umbilical hernia, auricular infections, eye infections and severe hemorrhoids and were not receiving adequate medical assistance. They further stated that food provided was not enough or adequate since the inmates themselves had to prepare it and that the water available might be contaminated by the presence of glass pieces and roaches wings. The minimum conditions for a decent life were not being protected, there were no appropriate places for the inmates to sleep and there were not enough products for their personal hygiene. The beneficiaries were not allowed to contact their next of kin or their attorneys. No administrative or judicial investigation was conducted in order to determine those responsible for the generation and maintenance of the detention conditions that the beneficiaries had to endure. There was only an administrative investigation commenced in order to identify and punish those detainees that had been involved in the riot of June 16, 2006.
In this instance the court reiterated its previous order but could do little more, as it does not possess any more obligatory powers with which to enforce its decisions. It remains largely at the mercy of the political will of the member states over which it adjudicates, a fact that has led to the prevalence of the commission within this region as a standard setter. In general, full compliance with the final judgments of the court has also been problematic (Cavallaro and Brewer 2008, p. 786). Another measure adopted to guarantee that persons subjected to imprisonment in the states that are members of the OAS have their rights respected was the creation of the position of Special Rapporteur on the Rights of Persons Deprived of Liberty in the Inter-American Commission of Human Rights, a commission member appointed pursuant to article 15 of the Rules of Procedure of the Commission by the Commission, with a maximum 3-year term that can be renewed by a fresh commission vote indefinitely. The functions of the Special Rapporteur include visiting places of detention, including places of detention of minors; preparing reports on the prison situation in detention centers in a country, region, or subregion; making recommendations to member states on the conditions of detention or imprisonment and monitoring compliance with them, and promoting the protection of fundamental rights and guarantees of the detained persons and their families, with special attention to the duties of the prison authorities and international rules on the use of force and firearms by officials responsible for enforcing the law (Escobar 2007, p. 62).

Since 2004 the Rapporteur has visited penitentiaries in Guatemala, Argentina, Brazil, Honduras, Colombia, Dominican Republic, Argentina, Haiti, Bolivia, Chile, and Uruguay (Dulitzky 2008 p. 105). However, there appears to have been little by way of independent evaluation of the efficacy of these visits. The most recent achievement of the Rapporteur was the adoption, by the Inter-American Commission of Human Rights, of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, as part of the process of drafting an Inter-American Declaration on the rights, duties, and care of persons under any form of detention or imprisonment. This may serve to reinforce structures that regulate prison conditions, as Principle XXIV provides: “In accordance with national legislation and international law, regular visits and inspections of places of deprivation of liberty shall be conducted by national and international institutions and organizations, in order to ascertain, at any time and under any circumstance, the conditions of deprivation of liberty and the respect for human rights.”

3. Africa. In the African context too there have been attempts to develop a system that could regulate prison conditions from the basis of the primary human rights institutions. Not only has the African Commission of Human and Peoples’ Rights, the body charged with the enforcement of the African Charter on Human and Peoples’ Rights, commented that the provision of the charter prohibiting torture and cruel, inhuman, and degrading treatment and punishment (art. 5) requires that prison conditions should meet minimum standards, but the commission has appointed a Special Rapporteur for Prisons from the ranks of the commissioners
to report on prison conditions in Africa and on occasion has heard individual complaints on conditions of detention.

A recent example of such a complaint that led to the commission making a finding on the shortcomings of substantive prison conditions was the matter of Institute for Human Rights and Development in Africa v. Republic of Angola (May 22, 2008, reported in the 24th Action Report of the Africommission of Human Rights [2007–8], pp. 86–107).52 For substantive standards, the judgments of the African Commission rely mostly on international instruments, such as the United Nations Standard Minimum Rules for the Treatment of Prisoners and the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Murray 2008, p. 211). However, the commission has acknowledged the 1996 Kampala Declaration on Prison Conditions in Africa and the 2002 Ouagadougou Declaration and Plan of Action on Accelerating Prison Reform in Africa, as well as the 2002 Robben Island Guidelines (Niyizurugero and Lesse`ne 2010),53 documents that were to a greater or lesser extent developed by international and regional nongovernmental organizations as reflective of best practices that should be adopted in the African context. All these documents include references to substantive conditions that need to be met in prisons to ensure that they do not end up subjecting their inmates to ill treatment that contravenes the charter (Murray 2008, pp. 214–15).

In 1997, the African Commission of Human Rights appointed a Special Rapporteur on Prisons and Conditions of Detention in Africa. Between 1997 and 2004, the Special Rapporteur on Prisons visited prisons in 13 countries and published reports on them (Viljoen 2007). The Special Rapporteur empowered by the African Commission (acting under art. 45 of the charter) to examine and make recommendations on the state of prisons in Africa, encourage states to comply with the charter and other international human rights law, and, when requested by the commission, advise it on matters arising before it. The commission appoints the Special Rapporteur from within its own membership for a period of 2 years and may renew this mandate any number of times.

The African process has been compared unfavorably, however, with that of the CPT (Murray 2008; see also Viljoen 2005) on several grounds. First, the visits depend on the permission of the country concerned, which means that the Special Rapporteur on Prisons was unable to react to complaints or to develop a program of visits that would cover the whole continent in the way that the CPT does in Europe. Second, the reports have been criticized for not making clear the basis on which their findings were made and for not relating them to standards set by the African Charter on Human and Peoples’ Rights or to other international instruments. It is also suggested that they did not pay enough critical attention to the legal grounds for the detention of unconvicted prisoners who were often held for very long periods before trial.
Although there is evidence that in some cases improvements in prison conditions did follow from recommendations made in individual reports of the Special Rapporteur (Viljoen 2005), this was not generally the case. The overall conclusion on developments in Africa is largely negative. The sporadic visits of the Special Rapporteur and the inadequate and relatively unmethodical reports that have followed from them, together with delays in the African Commission in pronouncing on serious abuses in prison, make it clear that one cannot speak of an effective system for the regulation of prison conditions having emerged at the African regional level. This said, over the years the Special Rapporteurs on Prisons have played an important role in highlighting major issues of African human rights, such as capital and corporal punishment (Sarkin 2008, p. 34), although on narrower questions of prison regulation they have remained largely constrained by political and budgetary limitations.

II. National Regulation

The initial focus on international regulation of prison conditions should not distract our attention from the fact that most of the immediate regulation is done at a national or even local level. How such regulation is practiced is best studied by focusing in the first instance on the functioning of individual national prison systems rather than on regulatory mechanisms that may appear to be similar but have different roles and highly varied impact in different societies.

A. England and Wales

The prison system in England and Wales is an example of a system in which substantive standards that prison conditions must meet are relatively poorly developed in legislation (Livingstone, Owen, and MacDonald 2008). The primary law, the Prison Act, dates back to 1952, and, although it has been amended many times, it does not deal with prison conditions in any detail. More detail is contained in the Prison Rules, which are regulations made in terms of the act. Historically they have not been regarded as a source of enforceable rights of prisoners to specific prison conditions, although, as explained below, this position has changed somewhat as the courts have gradually come to rely more heavily on them when questions of prisoners’ rights arise.

Standing orders and instructions issued by the prison service contain fuller information, but, although they have been public in recent years, they cannot be regarded as creating legally binding criteria for prison conditions.

The overall result of this relatively weak statutory position is that internal regulation of prison conditions in England and Wales is primarily focused on the implementation of self-generated standards. A good point of departure on these internal procedures of regulation is the work of Alison Liebling (2004), who has described in some detail how, in England and Wales, the national authorities seek to measure internal performance and thus regulate prison conditions. According to Liebling, the key internal techniques of regulation applied by the central prison
administration in England and Wales are key performance indicators (KPIs) and target and standards audits.

Key performance indicators are techniques for measuring specific organizational goals: for example, it may be a goal of the prison system as a whole to ensure that prison regimes provide purposeful activity for prisoners and that prison life is conducted in a relatively drug-free environment. Indicators of whether this is being done are then created in ways that can be measured: for example, a percentage of prisoners who are out of their cells for more than a certain number of hours each week, or the requirement that in regular drug tests no more than a certain percentage of prisoners should test positive. Such indicators can be applied in a sophisticated way to individual prisons, by setting goals for them to achieve that can be varied by setting specific key performance targets (KPTs) according to the challenges that a prison with a particular type of population or function faces.

The use of KPIs and KPTs is complemented by standards audits conducted by the Prison Service Audit Unit, that is, a body internal to the Prison Service (Bennett 2007). Its function is to ensure that staff apply all policies, financial and other, and procedures contained in the Prison Act, rules, standing orders, and instructions in a consistent way. The auditing process depends on staff in prisons keeping accurate records. In practice, a large part of the process is concerned with checking these records rather than ensuring that substantive standards of relevance to prison conditions are met.

External regulation, as identified by Liebling (2004), comes primarily from the national prison inspectorate and local independent monitoring boards (IMBs). In contrast to the process-driven internal forms of regulation in England and Wales, Her Majesty’s Inspectorate of Prisons (HMIP) is concerned much more with the substance of prison conditions. What the HMIP has done is to design its notion of what a healthy prison is, quite independently of the standards adopted by the prison service itself (Owers 2006). The HMIP is concerned with identifying what it describes as a healthy prison. The “Expectations” that healthy prisons are supposed to meet are set out in an official document of that name (HMIP 2006, p. 3), which specifies the “criteria for assessing conditions in prison and the treatment of prisoners.”

These criteria have been developed directly from international and regional prison standards rather than from the standards adopted by the prison service itself (Owers 2006). Close examination shows that this has been done in considerable detail. Every individual recommendation is cross-referenced to the relevant international or regional instrument. It is striking just how comprehensive the list is. It includes all the international and regional treaty obligations that the UK government has in this area, as well as the secondary standards of international and regional bodies of which the United Kingdom is a member. The 2006 EPR, in particular, are cited repeatedly to justify the most detailed “expectations.” Reference is also made to key judgments of ECtHR, which has set expectations in specific areas.
Structurally, the HMIP is a government-appointed body. However, it is independent of the Prison Service. Her Majesty’s Chief Inspector of Prisons reports directly to the Secretary of State for Justice on the treatment of prisoners and conditions in prison, and the reports are tabled in Parliament (sec. 5A of the Prison Act 1952). The Chief Inspector of Prisons is not someone with a prison service background, although members of her staff may be. The work is done by a mixture of scheduled and unscheduled inspections of individual prisons and thematic reports on particular issues, such as health care, that cut across the system as a whole. In practice, Her Majesty’s Chief Inspectors of Prisons have proved to be fiercely independent. Although chief inspectors have no direct policy-making function and merely report to the secretary of state, their reports are routinely published and contribute strongly to the public debate about prisons. The reports have been widely praised as providing independent and reliable accounts of prison conditions in England and Wales. They have changed prison practice in crucial ways: for example, by exposing the unhygienic and degrading practice of “slopping out” and eventually having it abolished, they have contributed directly to improving prison conditions. Their influence is so pervasive that the HMIP can be said indirectly to regulate prison conditions.

The second most important form of external monitoring of prison activity in England and Wales is that provided by the IMBs, formerly known as Boards of Visitors. Such boards, composed of volunteer lay citizens, have been established for each prison in the country. The function of the IMB is to “act as watchdog of the daily life and regime in an individual prison” (Livingstone, Owen, and MacDonald 2008, p. 11). The IMBs have access to all prisoners, who can complain to them about prison conditions, and to all parts of the prison for which they are appointed. The IMBs act by calling the attention of the governor of the prison to any matter that requires his attention and to inform the secretary of state (the minister) of any abuse. It is not entirely clear how effective this has been as a form of regulating prison regimes, but it is a component of the democratic oversight of prison conditions. . . .

To this already long list of regulatory institutions in England and Wales must be added the role of the ordinary courts. Historically, English courts tended to keep out of the regulation of prisons and routinely deferred to the authorities when it came to challenges from prisoners to the conditions that were provided for them in prison (Van Zyl Smit 2007). Perhaps for this reason, from the 1970s onward, several of the most important court decisions that directly affected English prison practices were taken by the ECtHR in Strasbourg rather than by the courts in London. However, that has gradually changed: prisoners’ rights generally are being recognized more freely by English courts, and both the common law and ECHR, which has been incorporated indirectly into English law (via Schedule 1 of the Human Rights Act 1998), are being applied to this end. However, as Lazarus (2004, 2006) has pointed out, the process is inherently flawed, as English law has no clear understanding of the purpose of imprisonment against which to judge the administrative actions of the authorities. In this regard the absence of modern prison legislation, which sets out a clear purpose of imprisonment and defines prisoners’
rights to acceptable prison conditions in a way that would meet the legal certainty requirements of the rule of law, is highly problematic.

Perhaps the best example of where legal intervention has had a direct and positive influence on prison conditions in the United Kingdom in a way that can be regarded as regulating prison conditions comes from Scotland rather than from England and Wales. In Scotland the practice of slopping out persisted longer than it did in England. It was heavily criticized by the CPT. Promises were made by the UK government to change the practice, and money was voted for the building of sufficient in-cell lavatories, but nothing was done about it. Finally, a Scottish prisoner sued the authorities on the grounds that his human rights had been breached as he was suffering from severe eczema because of the conditions in which he had been forced to live (Napier v. Scottish Ministers [2004] SLT 555 [2004] UKHRR 881). The Scottish court ruled in his favor, arguing that holding him under these conditions breached his right not to be subject to inhuman or degrading treatment—a right recognized in Scots law under both the Scotland Act and the UK-wide Human Rights Act. Napier was awarded damages. The practical effect on prison conditions was that the authorities had to move smartly to abolish the practice of slopping out while fighting the claims of many other prisoners who had suffered similarly. The judgment in this case also highlights how different regulatory standards forces can work together, for the court referred to both the ECHR and the EPR. It placed considerable weight on the reports of the CPT that had condemned the practice of slopping out and noted the failure of the Scottish executive to abide by earlier government undertakings to rectify the problem.

This degree of perceived fit between various national and international regulatory activities in the United Kingdom is fairly rare, however. It seems fair to say that, at the internal level, attempts at outside regulation are treated with some distrust. An illustration of the thinking of the government in this regard can be found in its response to the question of the Council of Europe on what it was trying to do to implement the 2006 EPR. While most governments attempted to demonstrate what they were doing positively, the UK government replied as follows:

The position of the EPR within England and Wales is different to the position in other nations as the EPR are mirrored by internal prison rules which are included in staff training whereas EPR are not. It has never been the position that the European Prison Rules, UN Minimum Standard Rules or any of its international obligations are identified within its own domestic legislation or included in its staff training, but rather that its own domestic legislation covers all its international obligations. It is therefore, not intended that a major launch is undertaken of the EPR. However, the policy leads for the Prison Service are aware of the need to ensure that their policies conform to international standards and the responsibility to insure Prison Rules continue to reflect its obligations. (Council of Europe 2007, p. 3)
This arrogant assumption that the United Kingdom’s (minimal) legislation and limited prisoners’ rights jurisprudence is somehow in step with, if not ahead of, international standards, while that of “other nations” is not, explains to a large extent why the United Kingdom has so often been found to be in breach of the ECHR on prison matters. These breaches range from early cases dealing with access to lawyers and the courts (Golder v. United Kingdom, App. No. 4451/70 [1979–80] 1 EHRR 524, February 21, 1975) and to correspondence (Silver v. United Kingdom (App. Nos. 5947/72 et al. [1983] 5 EHRR 347, March 25, 1983), to the more recent decisions finding that some prison disciplinary procedures did not meet the required due process standards (Ezeh and Connors v. United Kingdom [App. Nos. 39665/98 and 40086/98 (2004) 39 EHRR 1, October 9, 2003]) and that some visitors to prison were being searched in a way that amounted to degrading treatment in contravention of the ECHR (Wainright v. United Kingdom, App. No. 12350/04 [2007] 44 EHRR 40, September 26, 2006). It also underlies the delays and avoiding tactics that have characterized the reluctant implementation by the United Kingdom of the latest decisions of the Grand Chamber of the ECtHR against it on prisoners’ rights, such as the requirement that their right to vote be extended (Hirst v. United Kingdom [No. 2] App. No. 74025/01 [2006] 42 EHRR 41, October 6, 2001) or that their right to found a family by artificial insemination be respected (Dickson v. United Kingdom App. No. 44362/04 [2008] 46 EHRR 41, December 4, 2007; see Van Zyl Smit and Snacken, forthcoming).

In all, the regulatory position in England and Wales was well summarized by Hood et al. (1999, p. 116): “Prisons in England and Wales are subject to one of the densest patterns of oversight of any public sector activity. There has been a tendency to add new layers of regulation at various times without taking anything away, creating considerable overlap and duplication. Regulators who lacked formal powers were nevertheless observed to develop less formal mechanisms for seeking modification of behaviour.” For all the success of some forms of regulation, such as the HMIP, this still seems to be true of England and Wales today. . . .

F. South Africa

While most countries in Europe have increasingly been drawn into a regulatory framework that is reinforced by European policies and to a growing extent enforced directly by European institutions, in other parts of the world regulation of prison conditions has been reformed, and new forms of regulations established, without the same powerful regional forces being at work. In these instances more attention has been paid to comparative examples of what is perceived to be national best practice.

South Africa is an interesting example of a country that underwent a dramatic change in its political structure with the abolition of apartheid and the establishment of a constitutional democracy. As in Eastern Europe, doing something about its repressive prisons and the limited mechanisms regulating prison conditions was a priority. However, unlike the Eastern Europeans, the South Africans faced little pressure from the region or the international community. They were largely free to choose their own reformist models. The legal solutions that South Africa
adopted began explicitly with the new constitution. Both the so-called interim Constitution of 1993 and the “final” Constitution of 1996 contained a prohibition on torture and cruel, inhuman, or degrading treatment or punishment, which closely followed the established international pattern for a modern a bill of rights (Bassiouni 1993). In addition, reflecting the role of the prison in the repressive old South African regime, the new constitutions contained an explicit provision that “everyone who is detained, including every sentenced prisoner, has the right . . . to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment” (sec. 35 [2] of the Constitution of the Republic of South Africa, No. 108 of 1996). These core conditions of imprisonment are enforceable through the courts and the so-called Institutions Supporting Constitutional Democracy, including a Public Protector (ombudsman) and a Human Rights Commission (chap. 9 of the Constitution of the Republic of South Africa, No. 108 of 1996).

In due course the constitutional protections were complemented by new prison legislation, the Correctional Services Act of 1998, which specified prisoners’ rights to adequate prison conditions more comprehensively. At the same time the act created a range of new oversight measures over the recently demilitarized prisons’ service. Internal oversight was strengthened by providing for internal service evaluation through internal audits, inspections, and investigations.

External safeguards included a National Council of Correctional Services headed by a high court judge to advise on policy and, most important, a dual system of monitoring consisting of a national judicial inspectorate and independent prison visitors appointed for each prison. The system was designed to operate from the bottom up. Independent prison visitors, private citizens especially appointed to the task by the inspecting judge, would perform the function of a complaints body and would hear and attempt to resolve complaints at the level of the individual prison. Cases that could not be resolved would eventually be referred to the inspecting judge. The idea was that the independent prison visitors would provide a steady flow of information about prison conditions to the inspecting judge. At the same time, it would obviate the need for a separate complaints system.

The South African judicial inspectorate was closely modeled on HMIP in England, with the important difference that the South African inspector had to be a high court judge. This “Inspecting Judge” is appointed by the president and is responsible for recruiting assistants and an inspectorate (secs. 86–87, 89 of the Correctional Services Act, No. 111 of 1998). The inspecting judge was to conduct inspections in the same way and with similar powers to HMIP, although this would be combined with the function of dealing with complaints. Underneath the inspecting judge are the “Independent Prison Visitors,” one of whom is assigned to each prison by the judge, primarily as a means of evidence gathering for the judge’s annual (and extraordinary) reports to the executive (pursuant to sec. 90.4 of the 1998 Act), mainly by way of
regular visits to the assigned prison. The visitors need not have any specific qualifications (see generally chap. 10 of the 1998 Act).

In 2004 both the judicial inspectorate (Jagwanth 2004; see also Woods 2009) and the independent prison visitors (Gallinetti 2004) were themselves subject to independent evaluation. The conclusion was that, generally speaking, both systems operated effectively within their own parameters. However, although the inspecting judge has made major efforts to persuade the authorities to reduce prison overcrowding and was instrumental in introducing several reforms in that regard, there was little evidence that either body had succeeded in monitoring, and thus indirectly regulating, prison conditions generally, or in improving them substantially. Nevertheless, the influence of these bodies has been significantly stronger than the constitutionally mandated Institutions Supporting Constitutional Democracy, whose wider remit has led to their paying relatively little attention to prison conditions.

The gaps in oversight have not been filled by regional monitoring either. Although the Special Rapporteur on prisons of the African Commission on Human and Peoples’ Rights has produced a report on South Africa, it is not comparable to the detailed reports of the CPT. There is a dearth of the proactive dialogue between the regional inspecting body and the national state of the kind that the CPT has followed with the states it inspects in Europe. There is little reason to believe that either pan-African or international institutions have played a significant part in the regulation of prison conditions in South Africa. To some extent this is simply a function of the relative weakness of regional institutions in the area. . . .

H. The United States of America

When it comes to international instruments concerning prison standards, the United States is in a different position from the other countries described. For both political and constitutional reasons, it is reluctant to ratify human rights treaties, and when it has, it has sought to do so in a way that will not affect existing U.S. law or practice (Henkin 1995). This reluctance is even clearer where any form of international monitoring is involved. The United States is not a signatory to the Convention on the Rights of the Child. It has acceded to the ICCPR, but with a key reservation declaring that it “considers itself bound by article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual punishment and treatment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States” (Nowak 2005, p. 964).

Several countries objected to this reservation on the basis that such an attempt to limit a nonderogable right cast doubt on the commitment of the United States to the fundamental principles of the ICCPR (Nowak 2005, p. xxi). The HRC also expressed this view in a General Comment. In addition, the United States declared that it “understands that paragraph 3 of article 10 does not diminish the goals of punishment, deterrence and incapacitation as additional legitimate purposes for a penitentiary system” (Nowak 2005, p. 964). As the United States has
not ratified the First Protocol to the ICCPR, U.S. citizens cannot approach the Human Rights Committee directly. Similarly, the United States has not ratified the American Convention of Human Rights and the Inter-American Convention to Prevent and Punish Torture. Add to that the extraordinary diversity of prison systems and forms of prison governance at federal, national, and local levels, and one may conclude too readily that few generalizations can be made about regulation of prison conditions in the United States generally, except that it is patchy and uneven.

Such pessimism would ignore two important features of the regulation of prison conditions in the United States, namely the role of the standard setting and accreditation by professional bodies, particularly by the American Correctional Association (ACA), and the “hands-on” role of the courts. Both require further elaboration.

The ACA is a professional association of North American “correctional practitioners,” which has developed a detailed set of standards for prisons that it describes as “the national benchmark for the effective operation of correctional systems throughout the United States [that] are necessary to ensure that correctional facilities are operated professionally.” These standards contain very precise requirements relating both to physical standards, for accommodation for example, and to processes that have to be followed by the prison administration (Morgan 2000). More recently, the accreditation process has included some consideration of the quality of life in prison. Institutions that wish to be accredited by the ACA must submit themselves, and pay for, an evaluation conducted by an interdisciplinary expert team. The accreditation process is in the view of David Bogard, an ACA commissioner, “the closest approximation of a national external oversight mechanism in the U.S.” Bogard notes that the process is voluntary, and most penal institutions in the United States are not accredited: more state prisons than local jails are accredited. This latter comment is particularly interesting as it points again to the diversity of types of institutions that can exist within one country and the differing degrees of control that is exercised over them. In Texas, for example, although ACA accreditation is voluntary, the state requires private prisons to be accredited as a condition of its contractual relationship with them. However, local jails that are privatized are not subject to the same requirement (Bogard 2007). Indeed, external monitoring of local jails may be almost exclusively in the hands of elected officials.

The ACA accreditation process must be seen in tandem with the widespread intervention of the courts in the regulation of prison conditions in the United States. Viewed from an international perspective, what is unusual is not that prisoners approach the courts to enforce their rights to appropriate prison conditions but that in the majority of states the courts have intervened by becoming involved in the day-to-day administration of the prisons and thus directly in the regulation of prison conditions. Special masters have been appointed that have run regulated prison conditions in individual prisons or even whole prison systems for decades (Feeley and Rubin 1998).
American scholars have sought to understand why this form of regulation of prison conditions has been so influential (Jacobs 1983; Dilulio 1990; Deitch 1991; Feeley and Rubin 1998; Feeley and Swearingen 2004). Their conclusion is that it grew out of the wider civil rights movement in the 1960s, which had demonstrated that large-scale legal intervention could have significant effects. Although more restrictive interpretations of prisoners’ rights by the U.S. Supreme Court and attempts by Congress to limit prisoners’ rights litigation, most notably by the 1996 Prison Litigation Reform Act, have reduced prison litigation (Collins 2004), such litigation has continued to be a factor in the regulation of prison conditions in the United States (Feeley and Swearingen 2004), albeit one that is less effective than before (Schlanger and Shay 2008). In part this was because it chimed with attempts that were simultaneously also being made at other levels to reshape prisons into modern rational bureaucracies. Feeley and Swearingen (2004, p. 438), for example, comment that the modernizing efforts of the ACA found an echo in the courts, which embraced the ACA’s “bible,” the Manual of Correctional Standards, to guide their own reform efforts, and which have continued to do so. The interrelationship between the courts and the ACA, however, is not necessarily positive.

Morgan (2000) has noted that the ACA does not tend to set standards in areas where the courts have not done so. In his words: “In this sense the ACA is essentially a reactive mechanism representing the interests of penal providers” (Morgan 2000, p. 339). A general reason for the courts to intervene, to an extent that would perhaps not be considered necessary or appropriate elsewhere, has to do with the paralysis of other political avenues for reshaping prison policy in order to produce acceptable prison conditions (Sterngold 2008). In August 2009 this came to a head dramatically in California. A federal court, confronted by persistent evidence that, because of gross overcrowding over many years, the Californian prison system had not provided prisoners with a minimum standard of health care, ordered the state to produce for its approval a scheme for the release of 46,000 prisoners within 2 years, so that it would be able to provide adequate health care for the remainder (Coleman v. Schwarzenegger 2009, LEXIS 67943, No. CIV S-90–0520 LKK JFM P, slip op. [E.D.CA & N.D.CA, August 4, 2009] [three-judge panel]). The court explained that it had been driven to this extreme step by the consistent failure of the state government to provide sufficient resources to produce prison conditions that were constitutionally acceptable for the many additional prisoners that its “tough on crime” policies had incarcerated and had kept incarcerated for long periods. In the view of the court, the current economic crisis made any other solution impracticable; as the political process had demonstrated that it was incapable of taking the necessary steps, judicial compulsion was required to ensure that they were.

Litigation, however, has limits as a tool for regulating prisons. As Schlanger (2006, p. 622) has pointed out:

In some ways . . . prisons [in the United States] are worse today—more idle, more dehumanizing—but Eighth Amendment law is extremely limited: It exempts from constitutional analysis many of the issues that matter most to
prisoners, such as educational programming, work and other activities, and the custody level. So even though today’s paradigmatic prison failings are deeply troubling, they do not violate our current understanding of the Constitution. While today’s inmates do more time and there are more of them (which magnifies the importance of whatever failings our prisons have), there is little question that most American prisons stay more comfortably above the low constitutional floor today than they did in the past. (2006, p. 622)

III. Paths to the Future

As modern governments have become increasingly sophisticated, they have developed more complex lines of authority and bureaucratic controls within the state sector to regulate state pressures. In turn, this has created the possibility of microregulation of individual prisons and the conditions in them by the higher management echelons of larger prison systems (Jacobs 1977). Added to this is the emergence of techniques of public administration that use new bureaucratic techniques, such as key performance indicators and the more extensive use of auditing tools, which were initially more common in the private sector, to facilitate further the regulation of prison management (Liebling 2004).

The structural similarities of modern prison bureaucracies should not mask the reality that there are subtle differences in what regulators are asked to examine. Emerging most clearly in the context of England and Wales, there is a tension between the tools of bureaucratic measurement applied internally by the Prison Service and the more humanistic standards developed by HMIP, for example. A further tension exists between human rights–based claims for improved prison conditions, which have been largely the preserve of lawyers, and the preoccupation with minimization of the risks posed by prisoners, which increasingly has been defined as an area of bureaucratic expertise not easily open to outside challenge (Murphy and Whitty 2007).

Within a broadly human rights approach to imprisonment there are differences too, which relate to the substance of what may be claimed on behalf of prisoners, through the courts and otherwise, in order to “regulate” prison conditions. It seems that in countries such as Germany, where there is a clear idea not only that prisoners must be protected against abuse but that their human dignity must be recognized in other ways, including giving them a right to resocialize themselves, rights-based protection through the courts is more successful.

A clear understanding of the basis of prisoners’ rights also makes it easier for the courts to intervene on their behalf and thus to affect their overall conditions of detention. In England, for example, where there is a limited and conceptually underdeveloped notion of prisoners’ rights, courts have declined to intervene in disputes relating to prisoners’ rights to vote, declaring a philosophical dispute beyond their competence. In contrast, courts in other jurisdictions—Canada, South Africa, and the ECtHR, for example—where there are more fully developed
notions of prisoners’ rights, have all found the issue clearly justiciable and dismissed claims that loss of the right to vote could be justified as an additional implicit punishment or even that it could somehow have a reformatory influence.

The use of different legal standards and different regulatory techniques may make the regulatory process more complex than the evolution of clearer lines of bureaucratic authority may suggest, particularly where different elements of the bureaucracy seek to regulate prisons in different ways. This is complicated enough when purely internal regulation is concerned. However, the picture is further complicated where regulation is external to the prison bureaucracy. Moreover, the distinction between internal inspection and external monitoring is not always as clear in practice as is sometimes assumed.

It is also clear that a degree of independence of the organs of external oversight from the prison bureaucracy does not necessarily determine their influence on prison conditions. Equally important is the information that they gather and the power that they have to influence the actual prison conditions. However, regulatory agencies, such as prison inspectorates and ombudsmen, do gain some of their authority by their independence being recognized. Independent regulatory agencies may also play an important part in shaping wider policies that affect prison conditions. For example, the strictures of the CPT or of the federal court in California against overcrowding that causes unacceptable prison conditions may directly affect fundamental decisions about how many people should be imprisoned in a particular system.

Where there is a large degree of respect for international and regional institutions, as is, broadly speaking, the case in Europe, regulation by such institutions can add the authority of independent monitoring conducted by such institutions. However, even this effect is uneven as it depends both on the significance attached to such “outside” monitoring in individual countries and on the very diverse regulatory systems that continue to operate at the national level in spite of the overall trend to bureaucratic regularity. Moreover, there is inbuilt tension between human rights–led institutions, such as the CPT and the ECtHR in the European context, which are gradually developing standards driven by wider concepts of human dignity, and the desire for “neat” bureaucratic measures at the national level. In this regard Morgan (2000) has drawn an insightful comparison between the standards developed by the CPT in Europe and those of the ACA in the United States. He notes that both sets of standards contain considerable detail and provide a benchmark against which physical conditions in particular can be judged objectively. However, the proactive human rights orientation of the CPT makes it much more effective in developing standards that deal with regimes, in maximum security institutions, for example, that might be unnecessarily repressive, even where meeting technical standards of the kind set by the ACA.

In many parts of the world, however, the problem is not so much a clash of different regulatory standards but their almost total absence. Thus, in Africa regional regulation is weak
and in the Asia-Pacific region it does not exist. The states that have their own relatively effective regulatory mechanisms in these regions are the exception rather than the rule.

Viewed globally, the regulation of prison conditions faces the challenge of applying internationally recognized human rights values to the regulatory process. This challenge manifests itself differently in different parts of the world. In countries with developed national legal and bureaucratic structures, the question is how best to ensure that the existing structures conform to the wider norms. In less developed countries, national regulatory mechanisms need to be established and their compliance with international standards ensured at the same time.

At the conceptual level, the structure put forward by OPCAT, with its flexible combination of an international inspectorate, in the form of the SPT, applying international human rights standards, combined with NPMs, has the potential to address both issues.

At a strategic level this has been recognized too. A country such as the United Kingdom has been able to recognize several of its existing oversight bodies as NPMs, while coordinating them under the leadership of HMIP, which has a track record of principle-driven and independent external regulation. In other instances, states have developed, with the assistance of the SPT and the international nongovernmental organization, the APT, new NPMs that meet the criteria of independence while applying human rights–based standards of regulation effectively. France, for example, has chosen to establish a new NPM, the General Inspector for Places of Deprivation of Liberty (Law no. 2007–1545 of October 30, 2007, instituant un Controˆleur general des lieux de privation de liberte´). Several other countries have chosen to designate an existing national human rights body as their NPM and to make special provision for it to perform this work (Steinerte and Murray 2009).

In a perfect world, a sophisticated central OPCAT operation should be able to influence national strategies through the NPMs to develop optimal national regulatory systems that are sensitive to different national regulatory traditions, while at the same time using its direct powers of inspection strategically to advance human rights standards. There are considerable challenges, however, in persuading states to ratify OPCAT and create the necessary national mechanisms for its enforcement (Olivier and Narvaez 2009). Only a minority of states have yet ratified OPCAT, and China and the United States of America, both countries with large prison populations, show no sign of doing so. There is a real risk that the SPT, which is the functional heart of OPCAT, will remain a relatively insignificant organization within the larger United Nations human rights framework.

Globalization can, however, hasten the establishment of internationally recognized standards for regimes and mechanisms for their enforcement in other ways. Thus, for example, the various international criminal tribunals and courts, such as the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court, have had to think about conditions in their detention facilities and
about ways of ensuring that prisoners held there or in national systems when serving their internationally imposed sentences have adequate prison conditions (Van Zyl Smit 2005). They too have turned to international standards to help them prescribe conditions and to international organizations such as the ICRC and the CPT to assist in monitoring whether they are being applied in practice. Although the regulations developed by the tribunals and the courts for their own detention facilities may be criticized as insufficiently detailed, and the monitoring methods as not allowing sufficient publicity about prison conditions (Mulgrew 2009), their very existence is recognition of the importance of the regulation of clearly defined prison conditions.

Finally, it must be recognized that, while there have been several studies of different methods of the regulation of prison conditions, and much, sometimes polemical, debate about them, not nearly as much has been written about the substance of the standards they apply or their relative efficacy. Little or no work has been done, for example, on comparing homicide or suicide rates in prisons to which different regulatory systems are applied.

More work also needs to be done on the more subtle differences between systems that may influence what form of regulation will be most effective and also on the substantive standards to be applied to them. While a form of regulation may demonstrably be effective in its own terms, there is much less agreement about what constitute desirable prison conditions. In this regard scholars who have sought to develop measures that are independent of those generated by inspecting and monitoring bodies have much to offer. It would be very interesting, for example, to see how Alison Liebling’s (2004) concept of the moral performance of prisons could be applied across prison systems operating in different cultures. Anton Oleinik’s study, which compares the prison social climates in Russia and former Soviet bloc countries with those in France and Canada, is a step in this direction (Oleinik 2006), for he argues that cultural factors rather than material conditions alone are key determinants of how prison conditions are experienced by prisoners. However, extended studies of this kind need to be combined with careful efforts to disentangle the effects of regulation from wider social forces that may shape prison conditions. What this essay has shown is the complexity of the relationship between prison regulatory agencies and wider social formations.