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NOTE

Efforts to Fix a Broken System: *Brown v. Plata* and the Prison Overcrowding Epidemic

Lauren Salins and Shepard Simpson***

Excessive incarceration is a national problem. Across the country, prisons face dangerous levels of overcrowding, which has led to unconstitutional conditions of confinement and the inability of states to effectively rehabilitate their inmates. Ardent public support of "tough on crime" policies inhibits state legislatures from enacting successful reforms. In turn, states spend large percentages of their budget to sustain failing and ineffective corrections systems. By some estimates, states could save hundreds of millions of dollars annually if they reduced prison populations through proactive reforms, such as early release programs and diversionary tactics. In light of these factors, a consideration of the U.S. Supreme Court's decision in Brown v. Plata *to uphold an unprecedented prisoner release order is both timely and necessary as the case approaches its two-year benchmark.*

This Note argues that the Court's holding in Brown *did not overstep the judicial boundaries imposed by the Prisoner Litigation Reform Act (PLRA), but rather was a step in the right direction toward acknowledging and remedying constitutional violations occurring in California's severely overcrowded prison system. Moreover, the*

* Loyola University Chicago School of Law, J.D. expected May 2013. My gratitude to everyone who has contributed to this Article, including: Elana Baurer for opening my mind to prison reform; the Junior Members and Editorial Board of *Loyola University Chicago Law Journal*, with particular thanks to Susan Baker, Elizabeth Piekarz, Enzo Incandela, and Matt Costello for their extensive suggestions and edits; and Shepard Simpson for initially approaching me with the idea to co-author this Article and always maintaining a truly inspirational work ethic. Finally, thank you to my family for their unconditional love and support.

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Court's analysis of PLRA will help courts navigate the statute's procedural requirements.

While California has made progress toward complying with Brown*'s prisoner release order, this seminal case sheds light on the need for proactive reform in prison systems nationwide to prevent unconstitutionally high levels of overcrowding in the first place. As states are confronted with this new "release or reform" reality, this Note will facilitate the much-needed discussion surrounding long-term solutions to the overcrowding epidemic in U.S. prisons.*

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INTRODUCTION

Up to 200 prisoners live in a gymnasium where only two guards monitor their actions.[1] Fifty sick inmates remain in twelve-by-twenty-foot holding areas for hours while they wait to be seen by medical staff.[2] Suicidal prisoners are caged in spaces the size of telephone booths for prolonged periods of time, where they sit in pools of their own urine.[3] Doctors prescribe and administer the wrong medications to prisoners, which exacerbates health conditions and in some cases causes death.[4] Communicable diseases spread easily, and operating rooms face closure because existing medical spaces are excessively unsanitary.[5] One inmate murders another in the middle of an overcrowded prison, unbeknownst to officials until hours later because they could not see through the mass of prisoners.[6] These were the consequences of California's severely overburdened prison system for years.

On May 23, 2011, the U.S. Supreme Court in *Brown v. Plata* ordered California to reduce its prison population by approximately 38,000 to 46,000 inmates.[7] The Court imposed the order to remedy unconstitutional conditions of confinement that prevented the plaintiffs from receiving adequate medical and mental healthcare.[8] Although the

1. Brown v. Plata, 131 S. Ct. 1910, 1924 (2011). Additionally, as many as fifty-four inmates shared one toilet. David G. Savage & Patrick McGreevy, *State Ordered to Slash Inmate Levels*, L.A. TIMES, May 24, 2011, at A1.

2. *Brown*, 131 S. Ct. at 1925.

3. *Id.* at 1924. *See* Savage & McGreevy, *supra* note 1 ("A psychiatric expert reported observing an inmate who had been held in such a cage for nearly [twenty-four] hours, standing in a pool of his own urine, unresponsive and nearly catatonic.").

4. Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *19 (E.D. Cal. Aug. 4, 2009) [hereinafter Panel Report]. In 2004, a San Quentin prisoner who suffered from hypertension, diabetes, and renal failure was prescribed medication that worsened his condition. *Id.* The problem was not identified until a year later, just before the inmate died. *Id*. Another inmate was given Pepto-Bismol when he complained of chest pains; by the end of the day, he was found dead in his cell. Chris Megerian, *Some Fear End to Federal Oversight of Prison Care*, L.A.TIMES, Feb. 10, 2012, at A1.

5. Panel Report, *supra* note 4, at *19.

6. *Brown*, 131 S. Ct. at 1933–34.

7. *Id.* at 1928.

8. *Id.* at 1947.

claims in *Brown* focused on system-wide inefficiencies affecting the distribution of adequate healthcare, overcrowding affects nearly all aspects of incarceration, including sanitation, inmate security, and access to rehabilitative programs.[9] These conditions necessitate consideration of the Court's remedial role in corrections and whether reactive remedies, such as prisoner release orders, are effective in addressing constitutional violations caused by prison overcrowding.[10]

This Note argues that the Court's holding in *Brown* did not overstep the judicial boundaries imposed by the Prisoner Litigation Reform Act (PLRA), but rather was a step in the right direction toward effectively remedying serious constitutional violations in California's severely overcrowded prison system. Part I of this Note briefly explores prison overcrowding nationally and in California. Part I also provides an overview of Eighth Amendment jurisprudence in the prisoner rights context, as well as PLRA's process and implications. Part II then summarizes the facts leading up to the three-judge panel's prisoner release order, which is followed by a discussion of the majority and dissenting opinions in *Brown*.

Next, Part III provides a more in-depth assessment of the Court's interpretation and application of PLRA. In doing so, Part III affirms the need for judicial intervention to remedy prison overcrowding, notes the flexibility given to California to comply with *Brown*'s prisoner release order, and discusses how reductions in prison populations generally can reduce recidivism. Part IV then evaluates California's efforts to comply with *Brown*'s order as the two-year benchmark approaches. Additionally, Part IV argues that states should not implement reactive mechanisms to rectify prison overcrowding, but instead should employ proactive sentencing and prison reforms to effectively remedy unconstitutional conditions of confinement.

I. BACKGROUND

Overcrowding in prisons across the nation has recently drawn more attention to prisoners' rights and their severely deficient living conditions. As a result, litigation challenging conditions of confinement has increased. Prior to exploring constitutional challenges to prison conditions, it is important to understand why prisons across the United

9. *See infra* Part I.A.2 (discussing factors that impact overcrowding); *Brown*, 131 S. Ct. at 1940 ("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.").

10. *See infra* Part I.B–C (discussing courts' increasing involvement in corrections and prisoner litigation).

States have faced such severe levels of overcrowding.[11] This Part describes the causes of excessive prison populations and explains how overcrowding directly and adversely impacts conditions of confinement. This Part then details Eighth Amendment jurisprudence in the context of prisoners' rights. Lastly, this Part explains a pertinent legislative response to prison overcrowding: Congress's enactment of PLRA.

A. Prison Overcrowding and Conditions of Confinement

1. The Numbers

The U.S. prison population experienced a rapid influx between 1970 and 2007, growing by over 700% and effectively bringing the nation to the global forefront as the world's biggest incarcerator.[12] In 2008, 1 in 100 American adults was behind bars;[13] by 2009, 1 in 31 adults in the United States was either incarcerated or on some form of probation.[14] As of 2011, the United States imprisoned approximately 1.6 million offenders, or about 25% of the world's prison population, despite being home to only 5% of the world's population.[15]

State costs associated with this population growth reached $52 billion in 2011, making it the second biggest state budget consumer next to Medicaid.[16] This increase in corrections spending, while necessary to keep up with rising inmate populations, received significant public attention and criticism, especially when states diverted funding from

11. *See Brown*, 131 S. Ct. at 1922 ("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.").

12. *See* THE JFA INST., UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA'S PRISON POPULATION 1 (Nov. 2007), *available at* http://www.jfa-associates.com/publications/srs/UnlockingAmerica.pdf ("A generation of growth has produced prison populations that are now eight times what they were in 1970."). *See also* Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations'*, N.Y. TIMES, Apr. 23, 2008, at A1 (comparing the enormous prison population in the U.S. with those of other countries); Ian Thompson, *Step by Step in Fixing a Broken Criminal Justice System*, ACLU (Jan. 21, 2010), http://www.aclu.org/blog/racial-justice/step-step-fixing-broken-criminal-justice-system ("The U.S. currently has the dubious distinction of being, by far, the world's largest incarcerator, both in sheer numbers and in terms of percentage of the population.").

13. THE PEW CENTER ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 1 (Apr. 2011) [hereinafter PEW CENTER, REVOLVING DOOR], *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revolving_Door_America_Prisons%20.pdf.

14. *Id.*

15. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2011, at 2 (Nov. 2012), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus11.pdf; *Combating Mass Incarceration—The Facts*, ACLU (June 17, 2011), http://www.aclu.org/combating-mass-incarceration-facts-0.

16. PEW CENTER, REVOLVING DOOR, *supra* note 13, at 1.

other necessities, such as education.[17] Also notable is that despite increased corrections spending over the past few decades, national recidivism rates have remained relatively steady.[18]

California became an extreme example of this national problem due to the extraordinarily rapid increase in its prison population.[19] Between 1980 and 2006, the California Department of Corrections and Rehabilitation (CDCR) experienced a 600% increase in its inmate population, growing from 27,916 to 161,000.[20] Faced with a surging prisoner population, California struggled to acquire the requisite funding to match rapidly rising costs—partly due to the State's budget deficit and partly because of resistance from the public sector.[21]

Fueling this fiscal problem was the high cost of incarcerating an inmate in California. In 2005, the annual cost to incarcerate an adult prisoner in California, approximately $34,150, was 35% higher than the national average.[22] The cost of incarcerating a juvenile offender was

17. *See* BENENSON STRATEGY GRP., NATIONAL RESEARCH OF PUBLIC ATTITUDES ON CRIME AND PUNISHMENT 3 (Sept. 2010), *available at* http://www.mcohio.org/services/fcfc/exoffender_reentry/docs/PSPP_National_Research_web.pdf ("Voters would prefer to cut prison spending than cut K-12 education, higher education or health care, or raise property or business taxes."); Steven Hawkins, *Education vs. Incarceration*, AM. PROSPECT (Dec. 6, 2010), http://prospect.org/article/education-vs-incarceration (critiquing states' increasing expenditures on incarceration over education, especially when the economic downturn has limited state spending). *See also* Sharon Dolovich, *Incarceration American-Style*, 3 HARV. L. & POL'Y REV. 237, 240 & n.23 (2009) (arguing that America's "style" of incarceration does not reduce crime and promote public safety to expected levels but rather expends funds that could be "spent on more socially productive enterprises").

18. PEW CENTER, REVOLVING DOOR, *supra* note 13, at 9.

19. Craig M. Bradley, *The Right Remedy for Crowded Prisons*, 47 TRIAL 54, 56 (Aug. 2011). Between 1991 and 2001, California's incarceration rate increased by 42.5%. *Id.*

20. Brief of Corrections and Law Enforcement Personnel *Amici Curiae* in Support of Appellees at 14, Brown v. Plata, 131 S. Ct. 1910 (2011) (No. 09-1233) [hereinafter *Amici Curiae* CLEP].

21. The Governor's 2011–2012 proposed budget entailed a $150 million cut from adult and parole programs in light of the State's financial difficulties. *Governor Announces Proposed 2011-2012 Budget for State, CDCR*, CAL. DEP'T OF CORR. & REHAB. (Jan. 17, 2011), http://www.cdcr.ca.gov/News/This_Week/CDCR%20This%20Week%20January%2017%20%202011bfnl.pdf. The correctional budgetary strains have been described as follows:

> As the number of inmates has burgeoned, correctional budgets have been strained by many factors. Larger prison populations have led to the construction of more prisons with associated staffing and overhead expenses. More prisoners has also meant higher costs for basic necessities, along with increased costs for "optional" programming, such as GED instruction, vocational training, and drug and alcohol rehabilitation. Significant, too, has been the rapidly rising cost of delivering even rudimentary health care—a cost states bear in full for those within their custody.

Cecelia Klingele, *Changing the Sentence without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 469 (2010) (footnotes omitted).

22. Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, 37 CRIM. &

almost twice this amount.[23] As of the 2009–2010 fiscal year, the average annual cost per adult offender reached $46,700.[24] Despite these figures, inmate populations in California continued to grow, reaching an all-time high in 2008 when prisons were filled on average to 200% of their design capacity (some even to 300%).[25]

2. Causes and Implications

Although there are a number of factors that contribute to high prison populations nationally and in California, such as a growing populace,[26] overwhelming consensus points to the public's "lock them up and throw away the key" mentality as the primary culprit.[27] Legislatures, prompted by their constituents, have incorporated this perspective into policy decisions over the past several decades.[28] Strict determinate sentencing policies, including mandatory minimums,[29] habitual

JUST. 207, 222 (2008); JUSTICE POLICY INST., PROPOSITION 36: FIVE YEARS LATER 24 (Apr. 2006), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/prop36.pdf.

23. Petersilia, *supra* note 22, at 222. Incarcerating juveniles is typically more expensive because juvenile correctional facilities house smaller populations and the offenders are held in smaller, decentralized units that require more space and more staff to monitor. SHARI MILLER-JOHNSON & JOEL ROSCH, CTR. FOR CHILD & FAMILY POLICY, JUVENILE OR ADULT? ADOLESCENT OFFENDERS AND THE LINE BETWEEN THE JUVENILE AND CRIMINAL JUSTICE SYSTEMS 23 (2007), *available at* http://www.childandfamilypolicy.duke.edu/pdfs/familyimpact/2007/BriefingReport_07.pdf.

24. MAC TAYLOR, CAL. LEGISLATIVE ANALYST'S OFFICE, 2011 CAL FACTS 55 (Jan. 2011), *available at* http://www.lao.ca.gov/reports/2011/calfacts/calfacts_010511.pdf. Most inmate costs were related to security and healthcare during this time. *Id.* Compare this cost figure to the national average of $28,817. Adam Skolnick, *Runaway Prison Costs Trash State Budgets*, THE FISCAL TIMES (Feb. 19, 2011), http://www.thefiscaltimes.com/Articles/2011/02/09/Runaway-Prison-Costs-Thrash-State-Budgets.aspx#page1.

25. *See* Blake P. Sercye, Comment, *"Need-Narrowness-Intrusiveness" under the Prison Litigation Reform Act of 1995*, 2010 U. CHI. LEGAL F. 471, 471 (stating that California's prison system is severely overcrowded and that experts concede that "overcrowding in CDCR facilities [makes] providing appropriate physical and mental health care nearly impossible"). *See also Amici Curiae* CLEP, *supra* note 20, at 15 ("At a time when the largest prison in CDCR system had a design capacity of 3,900 inmates, there were fourteen CDCR prisons housing over 5,000 inmates. Several, in fact, held upward of 7,000 inmates." (citations omitted)).

26. For example, California's population rose from 33,871,648 in 2000 to 37,253,956 in 2010. *State & County Quickfacts*, U.S DEP'T OF COMMERCE, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/06000.html (last revised Jan. 10, 2013).

27. PAULA M. DITTON & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, TRUTH IN SENTENCING IN STATE PRISONS 2 (Jan. 1999), *available at* http://bjsdata.ojp.usdoj.gov/content/pub/pdf/tssp.pdf.

28. *See* Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 414–18 (discussing punitive policies of the 1980s and 1990s).

29. Mandatory minimums refer to minimum punishments set by Congress, which require that every judge "impose [them] on every offender who meets the statutory criteria, regardless of any other facts in the case." BARBARA S. VINCENT & PAUL J. HOFER, FED. JUDICIAL CTR., THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS 2 (1994), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/$file/conman

offender laws (such as "three-strikes" rules),[30] and truth-in-sentencing mandates[31] have placed more offenders behind bars for longer periods of time.[32] Furthermore, the "war-on-drugs" movement has criminalized certain drug-related activities that were not previously unlawful, which has led to even higher statewide incarceration rates.[33]

Strict parole policies also contribute to higher incarceration rates.[34] For example, California mandates stringent post-release oversight and imposes a number of probationary conditions on parolees.[35] As a result, California's inmates are imprisoned for longer terms and face a greater likelihood of returning to prison for parole violations.[36] In 2007, 61% of the inmates entering the California prison system represented parolees who had violated their terms.[37] Furthermore, there is often little logic to the punishments imposed for parole violations. For example, parolees who commit purely technical violations, such as failing to show up on time to a parole meeting, are typically sentenced to upwards of four months, while offenders who return to prison for

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30. Three-strikes laws require an offender to serve a minimum sentence after committing three offenses (typically felonies) proscribed by the law. California's three-strikes law, prior to voter approval of Proposition 36 in 2012, provided that a defendant who has been convicted of two prior felonies is subject to a minimum sentence of twenty-five years to life in prison for any third felony conviction. CAL. PENAL CODE § 667(e)(2)(A) (West 1999). Proposition 36 revised the law to impose life sentences only where new felony convictions were serious or violent. Substance Abuse and Crime Prevention Act of 2000 (codified at CAL. HEALTH & SAFETY CODE § 11999.4-.14 (West 2011); CAL. PENAL CODE §§ 1210, 3063.1 (West 2012)).

31. Truth-in-sentencing laws mandate that offenders serve a substantial (and often predetermined) portion of their sentence before a judge will consider parole eligibility. DITTON & WILSON, *supra* note 27, at 1.

32. Determinate sentencing, in its basic form, requires judges to adhere to strict sentencing guidelines (i.e., longer sentences than judges would otherwise impose), which ultimately limits the judiciary's discretion in sentencing. MARC MAUER, SENTENCING PROJECT, RACE TO INCARCERATE 152 (2006).

33. *See* John M. Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 J.L. & POL'Y 189, 190 (2005).

34. Sara Mayeux, *The Origins of Back-End Sentencing in California: A Dispatch from the Archives*, 22 STAN. L. & POL'Y REV. 529, 529 (2011).

35. *Id.* at 529–32. In California, parolees are frequently and quickly returned to prison for minor parole violations, such as missing a meeting or failing a drug test. *Id.* at 530. In 2009, "the odds that a California parolee would be returned to prison at least once during a three-year parole term were 70%." *Id.* at 531.

36. *Id.* at 536. It is notable that at

> a time when police officers and prosecutors felt increasingly constrained by judicial decisions at both the federal and state level that expanded the rights of criminal defendants, California parole officers offered themselves as a workaround, a way of sending dangerous people to prison without having to go through the plea bargaining and trial process.

Id. at 537.

37. Petersilia, *supra* note 22, at 218.

committing more serious infractions, like failing a drug test, serve ten months on average.[38]

The preceding statistics are clear: America's corrections systems are expensive, and the sentencing structures in both the United States and California lead to an ever-growing number of prisoners.[39] Although state spending on corrections has increased dramatically over the past few decades, it has failed to reach a level sufficient to support and expand the needed infrastructure to match the population influx.[40] The resulting effect has been grossly overcrowded prisons.[41]

Overpopulation and aging prison facilities directly and negatively affect inmates' living conditions.[42] In addition to the expenses and difficulties prisons face in accommodating population increases, overcrowding also imposes emotional and physical costs on inmates.[43] Overcrowding can lead to double-celling inmates, random housing assignments without proper assessments, deterioration of facilities, poor staff retention, and unsanitary conditions.[44] Furthermore, without adequate resources, medical issues and symptoms can remain unaddressed and undiagnosed.[45] Finally, overcrowding often impairs

38. Mayeux, *supra* note 34, at 531.

39. *See* PEW CENTER, REVOLVING DOOR, *supra* note 13, at 1 (noting the costs associated with prison population growth are now approximately $52 billion annually); Craig Haney, *The Wages of Prison Overcrowding: Harmful Psychological Consequences and Dysfunctional Correctional Reactions*, 22 WASH. U. J.L. & POL'Y 265, 269 (2006) (explaining how the influx in the prison population in the 1970s and 1980s resulted in a growth that became so large that it made it difficult for prison officials to keep track of and effectively supervise all of the facilities in their system).

40. *See* Chase Riveland, *Prison Management Trends*, 26 CRIME & JUST. 163, 169 (1999) (noting that inmate populations between 1990 and 1995 rose disproportionately higher than correctional facilities' capacities). States have frequently increased prison capacities without also increasing the needed infrastructure. Haney, *supra* note 39, at 266–67. While populations grew, programming, medical, and mental health resources did not. *Id.* at 266.

41. *See* Haney, *supra* note 39, at 266–67 (noting that overcrowding defines the extent to which a facility houses more prisoners than its infrastructure can humanely support).

42. Susanna Y. Chung, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, 68 FORDHAM L. REV. 2351, 2351 (2000).

43. *See* Mary D. Fan, *Beyond the Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 597 (2012) (referring to California's overcrowded prison system as being in a state of "fiscal and humanitarian crisis").

44. Chung, *supra* note 42, at 2352. *See Amici Curiae* CLEP, *supra* note 20, at 18 ("[O]vercrowding creates a 'situation where the demand [for medical care] significantly outstretches the ability to respond to the healthcare needs, both in terms of timing and actual service.'" (citation omitted)).

45. *See* Terence P. Thornberry & Jack E. Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects*, 35 HASTINGS L.J. 313, 331 (1983) (noting that one of the biggest challenges faced by prison administrators in the 1980s was the lack of order, which diverted their attention from other pressing matters); *California Can Relieve Packed Prisons without Eroding Safety*, CHRISTIAN SCI. MONITOR (May 24, 2011),

the supervisory capacity of staff, which in turn leads to chaotic prison environments and diminishes the corrections system's ability to reduce recidivism.[46] Despite these consequences, the overcrowding dilemma is hardly a new development. Studies have been predicting a prison-overcrowding crisis for decades.[47]

B. Judicial Response to Prison Overcrowding

Traditionally, courts treated conditions of confinement cases in a hands-off manner due in large part to avoid interfering with the legislative administration of corrections.[48] Beginning in the late 1960s, however, courts transitioned to a more hands-on approach with respect to inmates' rights as the need for prison reform began to outweigh separation of powers concerns.[49]

In a string of cases decided during this transitional period, the U.S. Supreme Court addressed the unconstitutionality of prison conditions and inmate treatment.[50] Through these initial cases, which included challenges against deprivation of good time credits[51] and punitive

http://www.csmonitor.com/Commentary/the-monitors-view/2011/0524/California-can-relieve-packed-prisons-without-eroding-safety (noting that the district court in *Plata* "found that a California prisoner needlessly dies every six or seven days 'due to constitutional deficiencies'").

46. Haney, *supra* note 39, at 284. From 2004 to 2007, California's recidivism rate was approximately 58%. PEW CENTER, REVOLVING DOOR, *supra* note 13, at 10. During 2007, about 16% of 1,180,469 individuals on parole nationwide returned to prison. *Recidivism*, BUREAU OF JUSTICE STATISTICS, http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=17 (last visited Mar. 17, 2013).

47. *Amici Curiae* CLEP, *supra* note 20, at 11. *See* Haney, *supra* note 39, at 267 ("[T]he problems we now face were repeatedly predicted and certainly could have been avoided if the many early warnings had been heeded.").

48. *See* Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act*, 29 CARDOZO L. REV. 291, 298 (2008) (stating that the foundation for the judiciary's initial hands-off approach stemmed from lack of corrections expertise and fear that "intervention by the courts [would] subvert prison discipline"). *But see* Thornberry & Call, *supra* note 45, at 313–14 (providing that the "traditional hands off approach of courts facing prison cases gave way to judicial activism" in the 1960s); JIM THOMAS, PRISONER LITIGATION: THE PARADOX OF THE JAILHOUSE LAWYER 83–84 (1988) (stating that the hands-off doctrine was a byproduct of separation of state and federal powers, lack of judicial expertise in corrections, and fear that judicial interference would undermine correction officials' authority).

49. A transition occurred when the Warren Court "further nationalized civil liberties by challenging abusive criminal justice practices of states which appeared to run counter to Constitutional principles." THOMAS, *supra* note 48, at 45. *See also* Chung, *supra* note 42, at 2358 (noting that in the 1960s and 1970s, courts departed from the hands-off approach).

50. *See infra* notes 52–63 and accompanying text (discussing exemplary cases where courts exercised jurisdiction in prisoner litigation cases).

51. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974) (upholding an inmate's challenge to the constitutionality of the Nebraska prison system's deprivation of good-time credits on Fourteenth Amendment grounds).

confinement conditions,[52] the Court indicated its willingness to address issues related to prison administration and prisoners' rights.[53] The Court's assertion that "there is no Iron Curtain between the Constitution and the prisons of this country" indicated its newfound approach: the Court would not recuse itself from cases considering prisoners' claims solely on the basis of state legislatures' traditionally discretionary role in corrections administration.[54]

Shortly thereafter, the Court heard a number of cases in which prisoners alleged Eighth Amendment violations.[55] Although the Court recognized that offenders face limitations on their personal liberties as a primary consequence of criminal behavior,[56] the Eighth Amendment guarantees inmates a basic level of rights and protections from cruel and unusual punishment.[57] Consequently, the Constitution requires prison systems and officials to provide inmates with necessities, such as

52. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 685–88 (1978) (finding that isolated confinement as a form of punishment was subject to Eighth Amendment scrutiny).

53. *See* Procunier v. Martinez, 416 U.S. 396, 413–415, 419 (1974) (holding that the decision to censor or withhold delivery of prisoners' mail had to be accompanied by at least minimal safeguards, and that bans against attorney-client interviews conducted by law student or legal paraprofessionals "constituted an unjustifiable restriction on the inmates' right of access to the courts"), *overruled by* Thornburgh v. Abbott, 490 U.S. 401 (1989); Bell v. Wolfish, 441 U.S. 520, 547 (1979) ("Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel . . . [hence] the [challenged] practice [or condition] must be evaluated in the light of the central objective of prison administration."); *Thornburgh*, 490 U.S. at 407 ("[P]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." (quoting Turner v. Safely, 482 U.S. 78, 84 (1987))); Helling v. McKinney, 509 U.S. 25, 31 (1993) (affirming that treatment of prisoners in correctional facilities is subject to Eighth Amendment scrutiny).

54. *Wolff*, 418 U.S. at 555–56.

55. *See infra* notes 61–68 and accompanying text (detailing the Court's objective and subjective frameworks in assessing prisoner litigation claims).

56. *See* Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 129 (1977) ("In seeking a mutual accommodation between institutional needs and objectives (of prisons) and the provisions of the Constitution . . . , this Court has repeatedly recognized the need for major restrictions on a prisoner's rights." (internal citations and quotations omitted)). *See also Substantive Rights Retained by Prisoners*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 943, 959 (2008) ("The Supreme Court has stated . . . that harsh conditions and rough disciplinary treatment are part of the price that convicted individuals must pay for their offenses against society.").

57. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. In *Robinson v. California*, the Court applied the Eighth Amendment to the states through the Due Process Clause of the Fourteenth Amendment. 370 U.S. 660, 666 (1962). *See also* Brown v. Plata, 131 S. Ct. 1910, 1928 (2011) ("Prisoners retain the essence of human dignity inherent in all persons"); Atkins v. Virginia, 536 U.S. 304, 311 (2002) (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man" as measured by evolving standards of society); Farmer v. Brennan, 511 U.S. 825, 832 (1994) (emphasizing that the state is required to ensure humane conditions of confinement).

clothing, food, shelter, and medical care.[58]

While corrections officials must uphold prisoners' constitutional rights, courts have issued conflicting decisions regarding what degree of rights-deprivation constituted an Eighth Amendment violation within the prison context.[59] In addressing alleged Eighth Amendment violations, the Supreme Court established two non-definitive tests to evaluate the validity of a prisoner's claim.[60] Objectively, as established in *Rhodes v. Chapman*,[61] the challenged conditions must be sufficiently serious such that they deprive inmates of basic life necessities in order to constitute cruel and unusual treatment. Subjectively, as put forth by the Court in *Estelle v. Gamble*[62] and *Wilson v. Seiter*,[63] prison officials must have had knowledge of, and disregarded, the excessive risk to the prisoners' health and safety posed by the unconstitutional conditions.

Despite establishing these objective and subjective standards, the Court did not provide lower courts with a cohesive framework to analyze these standards in cases involving prisoners' Eighth Amendment rights, especially with respect to the objective test established in *Rhodes*.[64] On the one hand, some courts follow a totality of circumstances approach and analyze whether conditions as a whole are in accord with constitutional guarantees.[65] Under this approach,

58. Helling v. McKinney, 509 U.S. 25, 32 (1993). *See also* Estelle v. Gamble, 429 U.S. 97, 103–04 (1976) (recognizing prisoners' right to healthcare in the prison setting); Petersilia, *supra* note 22, at 240 (noting that the failure to provide sufficient medical care constitutes deliberate indifference to inmates' serious healthcare needs).

59. *See infra* notes 61–68 and accompanying text (discussing the Eighth Amendment framework as put forth by the Court).

60. *See infra* notes 65–67 and accompanying text (discussing the totality of circumstances and core-conditions approaches).

61. Rhodes v. Chapman, 452 U.S 337, 347 (1996). The Court in *Rhodes* held that double-celling inmates did not violate the Eighth Amendment because there was insufficient evidence showing that double-celling was in fact harming the inmates. *Id.* at 352.

62. *Estelle*, 429 U.S. at 106. The Court stated: "In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Id. See also Farmer*, 511 U.S. at 828–29 (adopting *Estelle*'s deliberate indifference test to assess the prisoner-plaintiff's Eighth Amendment rights).

63. Wilson v. Seiter, 501 U.S. 294, 297 (1991). In *Wilson*, the plaintiff alleged that conditions of confinement—such as overcrowding, excessive noise, inadequate heating and cooling, and housing with mentally and physically ill inmates—were unsanitary, unsafe, and unconstitutional. *Id.* at 296. The Court found that the lower court should have considered the prison official's deliberate indifference to the plaintiff's plight and therefore remanded the case. *Id.* at 305–06.

64. *See* Chung, *supra* note 42, at 2361 (explaining that the Court did not identify exactly what constitutes a deprivation of a single human need, and therefore analytical gaps remained after the ruling). Consequently, lower courts have created differing standards for determining whether certain prison conditions, viewed together, violate the Eighth Amendment. *Id.*

65. *Rhodes*, 452 U.S at 347. The totality of circumstances approach involves courts making constitutional violation determinations on a case-by-case basis and considers whether the condition(s) "deprive inmates of the minimal civilized measure of life's necessities." *Id.* As an

courts look not only at basic necessities, such as adequate food and safety, but also at the day-to-day life of the prisoners, including recreational and rehabilitative opportunities.[66] On the other hand, some courts use a core-conditions approach and look solely at whether a prison adequately provides basic inmate necessities, including safety, shelter, sanitation, and healthcare.[67] Under both approaches, however, courts have consistently held that overcrowded prisons combined with unsanitary and unsafe conditions violate inmates' Eighth Amendment rights.[68]

C. PLRA's Purpose and Requirements

With the understanding that prisoners could seek legal redress if prison administrators violated their constitutional rights, inmates began to increasingly file federal court claims.[69] Organizations such as the

example of how the Third Circuit has interpreted this approach, see Tillery v. Owens, 907 F.2d 418, 432 (3d Cir. 1990) (determining that an "overcrowded, dilapidated, and unsanitary" prison infringed on the Eighth Amendment rights of its prisoners because it offended current notions of human decency).

66. Chung, *supra* note 42, at 2362.

67. *Id.* at 2366–68. Courts using the core-conditions approach must identify specific, inadequately provided, enumerated conditions in order to find an Eighth Amendment violation. *Id.* These core conditions consist of deprivations of food, clothing, medical care, safety, and shelter. *Id.* Furthermore, one core condition must be sufficiently inadequate to merit a finding of constitutional violation; several subpar conditions that do not on their own reach a level of cruel and unusual punishment cannot be combined to reach an Eighth Amendment violation. *Id. See also* Hoptowit v. Ray, 682 F.2d 1237, 1246–47 (9th Cir. 1982) (stating that basic conditions must be assessed independently to see if each reaches a level of inadequacy necessary to find an Eighth Amendment violation). It is noteworthy to mention that mental healthcare is not a core condition and is not considered by courts in this approach. Chung, *supra* note 42, at 2366–68.

68. *See* Williams v. Griffin, 952 F.2d 820, 821–27 (4th Cir. 1991) (reversing summary judgment where plaintiff's claim alleged overcrowding and unsanitary conditions when he was confined to a twenty-by-twenty-foot cell designed to fit four people with eleven other inmates, and inmates were required to walk on floors flooded with sewage). *But see* Chandler v. Crosby, 379 F.3d 1278, 1298 (11th Cir. 2004) (holding that high temperatures in Florida's prisons is not an extreme deprivation that meets the level of an Eighth Amendment violation). *See* Edward J. Hanlon, *Proof of Unconstitutional Prison Conditions*, 24 AM. JURIS. PROOF OF FACTS 3d § 7 ("Courts have often stated that overcrowding is not, per se, a violation of inmates' rights. Whether overcrowding rises to the level of a constitutional violation requires a determination as to whether this condition causes inmates to endure genuine deprivations and hardship given the 'totality of circumstances' of confinement." (footnotes omitted)).

69. Sercye, *supra* note 25, at 471–72. *See also* Kristen S. Coy, Note, *Exhaustion under the PLRA: Reinforcing the Rehabilitative Function of American Prisons*, 14 WIDENER L.J. 989, 996 (2005) ("The legislative record surrounding the adoption of the PLRA is replete with references discouraging frivolous prisoner civil rights claims."); Hon. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520–21 (1996) (describing the compilation of a "Top Ten Frivolous Filings List," which contained a case in which a prisoner sued under PLRA after the prison charged his inmate account for the wrong kind of peanut butter).

American Civil Liberties Union, which from the 1970s onwards spearheaded campaigns to push prisoner rights litigation into courts, fueled this movement.[70] As a result, the numbers of frivolous claims and the requisite costs to litigate these matters increased exponentially, which incited Congress to enact PLRA.[71]

Congress intended for PLRA to counteract the current of frivolous prisoner litigation and to curtail perceived abuses of the judicial system by restricting the scope of relief available to prisoner-plaintiffs.[72] To address these issues, PLRA established a comprehensive set of standards that courts must apply to determine prospective relief in conditions-of-confinement cases.[73] For example, PLRA's exhaustion provision requires that inmates use all prison administrative avenues prior to filing a civil rights claim.[74] Most relevant to the *Brown* case,

70. *See generally Prisoner Litigation*, ACLU, http://www.aclu.org/search/prisoner%20litigation?show_aff=1 (last visited Nov. 20, 2012) (providing examples of ACLU's involvement in prisoners' rights throughout the past decade).

71. *See* Coy, *supra* note 69, at 997 (noting that the total cost per year for all states to defend prisoner law suits was $81 million in 1995). *See also* Shay & Kalb, *supra* note 48, at 299 (noting that Congress enacted PLRA in the "midst of America's prison boom" and that PLRA's "stated purpose was to reduce frivolous inmate litigation and over-reaching by federal courts"). By 2000, five years after the passage of PLRA, prisoner suits decreased by 39%. *See* Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Appellants at 13, Brown v. Plata, 131 S. Ct. 1910 (2011) (No. 09-1233) ("PLRA . . . arose from a deep public dissatisfaction with the way the federal courts had handled prison litigation. The three-judge court provision was considered among the important new requirements . . . ." (internal citations and quotations omitted)). In essence, PLRA was an expansion of the Civil Rights of Institutionalized Person's Act (CRIPA) of 1980, which allowed a 180-day suspension of claims to ensure that all administrative remedies had been exhausted by the prisoner prior to seeking judicial review. *See* 42 U.S.C. § 1997e(a) (2006) ("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.").

72. 42 U.S.C. § 1997e(a), e(e). *See* Shay & Kalb, *supra* note 48, at 301 (describing PLRA's limiting provisions, including a "three-strikes" rule that prohibited prisoners from filing more complaints following three that were frivolous, malicious, or did not state a claim upon which relief could be granted; a provision that required even indigent prisoners to pay filing fees; and a statement that prohibits recovery for mental or emotional injury without a showing of physical injury).

73. Recent Case, *Constitutional Law—Eighth Amendment—Eastern District of California Holds That Prisoner Release Is Necessary to Remedy Unconstitutional California Prison Conditions*, 123 HARV. L. REV. 752, 752 (2010) [hereinafter Recent Case, *Constitutional Law*].

74. *See* 42 U.S.C. § 1997e(a). PLRA requires prisoners to exhaust all administrative remedies before filing complaints in federal court. However, the term "exhaustion" has been indecisively interpreted, and issues regarding whether a procedural default component is incorporated into PLRA have arisen. In other words, the issue before federal courts is whether failure by a prisoner to completely exhaust all administrative grievance procedures bars relief even if no other relief is available. Coy, *supra* note 69, at 994. *See, e.g.*, Woodford v. Ngo, 548 U.S. 81, 103 (2006) (holding that PLRA incorporates a procedural default component). Section 1983 of 42 U.S.C. provides the right of action to individuals whose constitutional rights have been infringed and states in part that:

PLRA created a requirement that prisoner release orders remain remedies of last resort.[75] PLRA's prisoner release order process requires that a three-judge panel determine whether such an order is necessary and narrowly tailored to address the constitutional violations stemming from confinement conditions.[76] As defined in PLRA, the term "prisoner release order" does not solely refer to an order that instructs a state to release inmates, but also includes other forms of injunctive relief, such as population caps.[77]

Before a panel may be convened, however, the district court must: (1) enter an order for less intrusive relief;[78] (2) determine that the relief failed to remedy the constitutional violation after a reasonable allocation of time;[79] (3) find clear and convincing evidence that overcrowding was the primary cause of the violation;[80] and (4) determine that no other relief would remedy the violation such that the order is the least intrusive means necessary to correct the violation.[81]

Contention arose from both PLRA's restrictions on court intervention in corrections administration and the long-standing, overarching debate over the federal court system's appropriate role in addressing prisoner abuse by prison officials.[82] PLRA, however, does not entirely foreclose

> Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

42 U.S.C. § 1983.

75. 18 U.S.C. § 3626(a)(3)(A) (2006). *See* Recent Case, *Constitutional Law*, *supra* note 73, at 752 (asserting PLRA's provisions were intended to make prisoner release orders remedies of last resort). *See also* Brown v. Plata, 131 S. Ct. 1910, 1929 (2011) (stating that PLRA serves to restrict the circumstances under which a court may enter an order that effectively caps the prison population).

76. 18 U.S.C. § 3626(a)(2). The federal judge who oversees the case—on his or her own initiative or upon by plaintiff's request—may request the convention of a three-judge court to determine whether a prisoner release order should be entered. 18 U.S.C. § 3626(a)(3)(C)–(D). *See also* 28 U.S.C. § 2284 (describing the procedure for convening a three-judge panel).

77. Under PLRA, a prisoner release order includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population or that directs the release from or non-admission of prisoners to a prison. 18 U.S.C. § 3626(g)(4). In other words, PLRA's definition of prisoner release order includes orders that affect prison populations without necessarily requiring release. *See* Sercye, *supra* note 25, at 475 (defining prisoner release order as encompassing temporary restraining orders or ones that provide temporary injunctive relief).

78. 18 U.S.C. § 3626(a)(3)(A)(i).

79. *Id.*

80. 18 U.S.C. § 3626(a)(3)(E)(i).

81. 18 U.S.C. § 3626(a)(2), (3)(E)(ii). The public safety consideration is part of the narrowly drawn and tailored requirement of 18 U.S.C. § 3626(a)(2).

82. *See* Shay & Kalb, *supra* note 48, at 297 (referring to PLRA as "closing of the courthouse

orders that limit prison populations.[83] Instead, the dramatic increase in prison populations and the unconstitutional conditions of confinement that result from overcrowding provided a foundation for PLRA's application, allowing for heightened judicial intervention in the corrections sector.[84]

II. DISCUSSION

California's prisons have consistently failed to effectively administer mental health and medical care services to inmates.[85] This grim reality sparked a series of cases that confronted whether a reduction in prison population was necessary to cure Eighth Amendment violations in California's corrections system. This Part begins with an overview of two class action lawsuits—*Coleman v. Wilson* and *Plata v. Schwarzenegger*—which were later consolidated in *Brown v. Plata*. This Part then discusses the three-judge panel's order to reduce California's prison population. Finally, this Part summarizes the Court's majority opinion in *Brown* and provides an overview of the objections raised by Justices Scalia and Alito in dissent.

A. The Precursor Cases to Brown v. Plata

1. *Coleman v. Wilson*

In the early 1990s, a class of inmates in *Coleman v. Wilson* alleged that inadequate mental healthcare services in California's prison system gave rise to Eighth Amendment violations.[86] The *Coleman* court held

door"). *See also* Ronald L. Goldfarb & Linda R. Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 181–82 (1970) (discussing the controversy surrounding the Court's hands-off approach).

83. *See* 18 U.S.C. § 3626(a)(3) ("In any civil action with respect to prison conditions, no court shall enter a prisoner release order 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."); Brown v. Plata, 131 S. Ct. 1910, 1937 (2011) ("Congress limited the availability of limits on prison populations, but it did not forbid these measures altogether.").

84. *See, e.g.*, Miller v. French, 530 U.S. 327, 336 (2000) (interpreting PLRA's automatic stay provision); Gilmore v. California, 220 F.3d 987, 998 (9th Cir. 2000) (finding PLRA constitutional and not "lightly assuming" Congress would infringe on constitutional rights); Tyler v. Murphy, 135 F.3d 594, 597 (8th Cir. 1998) (assessing whether ordered injunctive relief was in compliance with PLRA's provisions, and holding that a prisoner release order cannot be imposed unless the three-judge court makes findings consistent with PLRA's requirements).

85. *See* LITTLE HOOVER COMM'N, TIME IS RUNNING OUT, at i (2010), *available at* http://www.lhc.ca.gov/lhc/185/Report185.pdf (stating that California consistently failed to provide constitutionally adequate prisons and that its "time ha[d] run out" to remedy the situation on its own).

86. Coleman v. Wilson, 912 F. Supp. 1282, 1293 (E.D. Cal. 1995).

for the plaintiffs and determined that several constitutional deficiencies existed in the administration of mental healthcare, including delays in access to treatment, inadequate screening and assessment tools, and inefficient distribution of medication.[87]

Based on these findings, the court ordered CDCR to develop remedial plans under the supervision of a court-appointed Special Master.[88] Despite the Special Master's efforts,[89] the *Coleman* court reconvened twelve years later and found overwhelming evidence that overcrowding in California prisons caused systematic failure in mental health treatment.[90] Serious shortages in staff persisted, and inmates whose ailments posed a danger to themselves and others still waited indefinite lengths of time for treatment.[91]

2. *Plata v. Schwarzenegger*

In 2005, another class of prisoner-plaintiffs filed a claim against the State of California in *Plata v. Schwarzenegger*, alleging that inadequacies in the provision of medical healthcare services in the State's prisons violated their Eighth Amendment rights.[92] After a series of negotiations, the parties ultimately reached an agreement for injunctive relief that required the State to formulate a remedial plan

87. *Id.* at 1308–15. The court found that some prisoners went years without necessary medical attention. *Id.* at 1316. It also found chronic understaffing and an inadequate record-keeping system. *Id.* at 1308–15.

88. *Id.* at 1323–24. A Special Master is a judicial officer appointed by the court to oversee and monitor a party's compliance with judicial orders. FED. R. CIV. P. 53. In PLRA cases, Special Masters are authorized to conduct hearings, prepare proposed findings of fact, and assist with the development of remedial plans. 18 U.S.C. § 3626(f)(6) (2006). Eighteen months after his appointment in 2005, the Special Master in *Coleman* submitted a report outlining his proposed remedial plans, the "Health Services Delivery System Program Guides," which the court accepted. Panel Report, *supra* note 4, at *26.

89. The main focus of the efforts was to develop a reliable screening process and find the needed staff and space to accommodate inmates with serious medical needs. *See* Panel Report, *supra* note 4, at *27–33 ("[T]he court has repeatedly ordered defendants to create the necessary positions and to hire staff to fill those positions.")

90. *See id.* at *28 (noting that once improvements were made in the screening process, it became obvious that much more space was needed in order to accommodate all the inmates with serious mental disorders).

91. *See id.* at *23–24, *35 (noting that constant systematic failures made it difficult for CDCR to retain competent medical staff). *See also* Brown v. Plata, 131 S. Ct. 1910, 1934–35 (2011) (explaining why overcrowding caused chaos and inmate suffering in the CDCR system).

92. Plata v. Schwarzenegger, No. C01-1351 TEH, 2005 WL 2932253, at *1–2 (N.D. Cal. Oct. 3, 2005). For example, a prisoner who reported fever and chills did not receive proper medication, ultimately resulting in his death. *Id.* at *4–5. In an investigation into his death, one doctor stated that the course of treatment administered to the inmate was "the most reckless and grossly negligent behavior [he had] ever seen by a physician." *Id.* at *5 (internal quotations omitted).

supervised by correctional experts.[93] Three years later, however, overall compliance with the stipulated order was virtually non-existent, and the appalling conditions persisted.[94] The *Plata* court concluded that it had no alternative but to place CDCR's medical healthcare system under the supervision of a court-appointed Receiver.[95] But after seven years of remedial efforts,[96] the Receiver found that the necessary improvements had not been made and life-threatening conditions persisted throughout California's prison system.[97]

B. Consolidation before a Three-Judge Panel

Overcrowding in California's prisons led former Governor Schwarzenegger to declare the system in a state of emergency.[98] In his Prison Overcrowding State of Emergency Proclamation, the Governor stated that "all [thirty-three] of [California's] prisons are now at or above maximum operational capacity and [twenty-nine] prisons are so overcrowded . . . [that they] pose substantial safety risks."[99] Following this proclamation, *Plata*'s Receiver and *Coleman*'s Special Master

93. Panel Report, *supra* note 4, at *11–12. The stipulated policies and procedures were extensive: 800 pages in 11 volumes. *Id.* at *12. For example, they required that California construct five new prisons a year and provide audits of inmate health records, and they were to be implemented on a step-by-step basis with the goal of gradually relieving the devastating pressure overcrowding placed on the prison system. *Id.* at *12–13.

94. *Id.* at *13. As of May 2005, when the court expected the stipulated remedial policies and procedures to be completed in twelve prisons, not a single prison was in compliance. *Id.* As the district court in *Plata* stated:

> The harm already done in this case to California's prison inmate population could not be more grave . . . . The Court has given defendants every reasonable opportunity to bring its prison medical system to constitutional standards, and it is beyond reasonable dispute that the State has failed. . . . [O]n average, an inmate in one of California's prisons needlessly dies every six to seven days due to constitutional deficiencies in the CDCR's medical delivery system. This statistic, awful as it is, barely provides a window into the waste of human life occurring behind California's prison walls . . . .

Plata, 2005 WL 2932253, at *1. *See also* Panel Report, *supra* note 4, at *14 (explaining that in 2005, the plaintiffs produced reports from San Quentin Prison that indicated various instances of "incompetence, indifference, cruelty, and neglect in the medical services offered by the prison").

95. *Plata*, 2005 WL 2932253, at *10. When the court places a prison system in Receivership, the Receiver not only has monitoring authority like a Special Master, but is also given administrative authority within the prison system to carry out changes that he or she deems necessary. *See* 28 U.S.C. § 3103 (2006) (discussing the appointment procedures and role of a Receiver).

96. Panel Report, *supra* note 4, at *21. There were two Receivers appointed in succession. *Id.* The Receivers ultimately implemented a new pharmacy system, instituted pilot programs to improve screening and chronic care management, and recruited and retained clinical staff. *Id.*

97. *Id.* at *181–82.

98. Arnold Schwarzenegger, *Prison Overcrowding State of Emergency Proclamation*, OFFICE OF THE GOVERNOR (Oct. 4, 2006), http://gov.ca.gov/news.php?id=4278 [hereinafter *State of Emergency Proclamation*].

99. *Id.*

independently determined that a reduction in California's state prison population was necessary to eliminate Eighth Amendment violations occurring in CDCR facilities.[100] The Ninth Circuit granted motions to convene a three-judge panel, and soon thereafter the cases were consolidated and transferred to a three-judge panel in *Coleman v. Schwarzenegger*.[101]

After fourteen days of testimony, the panel issued a 184-page report ordering a reduction in California's prison population to 137.5% of the system's design capacity—a decrease of about 38,000 to 46,000 prisoners—within two years.[102] The panel emphasized that, although the Constitution does not require California to provide its inmates with "state-of-the-art medical and mental health care," it does require the State to provide care consistent with civilized standards of society and to prevent unnecessary and wanton infliction of pain or death.[103] The court found that California's prison system, which it referred to as "bursting at the seams," denied the plaintiff classes these constitutional guarantees.[104] The panel deemed overcrowding a significant and widespread source of the problem.[105]

The court gave California discretion in structuring targeted and effective remedial methods to comply with the panel's decision, as well as the option to move to modify the order in the future.[106] Essentially, the court held that California could take any avenue it deemed prudent in drastically downsizing the inmate population of state prisons, including construction of new facilities or inmate transfers.[107] In

100. Panel Report, *supra* note 4, at *46–48.

101. Plata v. Schwarzenegger, No. C01-1351, 2007 WL 2122657, at *1–2 (N.D. Cal. July 23, 2008). *See* Panel Report, *supra* note 4, at *48. The *Plata* court recommended consolidation to ensure "judicial economy" and to avoid "the risk of inconsistent judgments." *Id. See* 18 U.S.C. § 3626(a)(3)(C) (2006) ("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 . . . ."). *See generally* Bowring v. Goodwin, 551 F.2d 44, 47 (4th Cir. 1977) (explaining that the right to medical care for physical illness is coextensive with the right to psychological or psychiatric care).

102. Panel Report, *supra* note 4, at *120; Brown v. Plata, 131 S. Ct. 1910, 1928 (2011).

103. Panel Report, *supra* note 4, at *6.

104. *Id.* at *6–7. *See also supra* Part I.B (discussing the Court's Eighth Amendment application to prisoner claims).

105. The widespread overcrowding in CDCR, approximately 190% of system-wide design capacity, was "extraordinary" and "almost unheard of." Panel Report, *supra* note 4, at *55 (internal quotations omitted). The Special Master and Receiver further confirmed this finding. *Id.* at *46–48. *See Plata*, 2007 WL 2122657, at *3 (stating California had ample time to remedy prison overcrowding but had failed to do so, as confirmed by the Receiver).

106. *Brown*, 131 S. Ct. at 1947; Panel Report, *supra* note 4, at *122.

107. California had discretion to implement any mechanism it desired to depopulate its prisons, such as out-of-state transfers, new facilities construction, and other effective means of compliance. *Brown*, 131 S. Ct. at 1941. The Court, however, acknowledged certain programs

mandating a target population, however, the court made clear that it would not tolerate more empty promises about remedying the constitutional violations.[108]

C. Majority Upholds Prisoner Release Order

The State of California petitioned the U.S. Supreme Court for review, arguing that the *Coleman* and *Plata* courts improperly convened three-judge panels, and that the consolidated panel lacked jurisdiction to issue the prisoner release order, failed to consider the most current prison conditions, and erred in interpreting PLRA.[109] In a 5-4 decision, the *Brown* Court affirmed the three-judge panel's order.[110] The majority recognized that judicial action was necessary in light of glaring Eighth Amendment violations and the observed failure of lengthy, extensive past remedial efforts.[111]

Writing for the majority, Justice Kennedy highlighted the constitutional violations stemming from inadequate medical and mental healthcare in California's prisons.[112] Kennedy noted that one prison forced a suicidal inmate to stay in a "telephone-booth sized cage" without a toilet simply because there was no other space to put him.[113] Additionally, nearly 75% of suicides in California's prisons were preventable and foreseeable.[114] Delays in medical and mental

and procedures the state could implement, such as expansion of good time credits, diversion of technical parole violators, and diversion of low-risk offenders to community based programs. *Id.* at 1943.

108. *See id.* at 1941 (finding that the "State ha[d] not proposed any realistic alternative to the order" and its "desire to avoid a population limit" created "a certain and unacceptable risk of continuing violations of the rights of sick and mentally ill prisoners").

109. *See generally* Brief of Appellants, Brown v. Plata, 131 S. Ct. 1910 (2011) (No. 09-1233).

110. *Brown*, 131 S. Ct. at 1947. *See generally* Christopher E. Smith, *The Changing Supreme Court and Prisoners' Rights*, 44 IND. L. REV. 853 (2011) (suggesting that the Supreme Court's view on prisoners' rights has changed over the past several decades, and it is unclear how the *Roberts* Court will continue to interpret this area of law).

111. *Brown*, 131 S. Ct. at 1923. The Court stated that the "population reduction potentially required is . . . of unprecedented sweep and extent. Yet so too is the continuing injury and harm resulting from these serious constitutional violations." *Id.*

Although the Court did not explicitly term its assessment of the Eighth Amendment violations as a core-conditions analysis, the following statement is a strong indication that it was in fact taking such an approach: "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." *Id.* at 1928. *See supra* note 67 and accompanying text (discussing the core-conditions approach).

112. *Id.* at 1924–26.

113. *Id.* at 1924.

114. *Id.* at 1924–26. The suicide rate in California's prisons at the time *Brown* was decided was one per week. *Id.* at 1924. *See also* CAL. DEP'T OF MENTAL HEALTH, CALIFORNIA

healthcare were frequent; in fact, one officer testified that nearly fifty sick prisoners were held together in a twelve-by-twenty-foot cage for several hours as they awaited medical services.[115] Consequently, many prisoners suffered from severe illnesses and unnecessary pain.[116]

The *Brown* majority also examined PLRA's requirements and analyzed whether the district court properly accounted for each of PLRA's prongs.[117] The Court first determined that the *Plata* and *Coleman* courts entered orders for less intrusive means,[118] emphasizing the appointments of the Special Master and Receiver as evidence that the requirement was met.[119] The Court also rejected the State's argument that it received insufficient time to comply with previous remedial orders, finding that over a decade had passed without resolution to California's prison overcrowding crisis and that state-offered remedies were still ineffectively implemented.[120]

Next, the Court determined that overcrowding in California's prisons was the primary cause of the alleged Eighth Amendment violations.[121] It reasoned that evidence previously presented at trial indicated that many of the constitutional violations directly resulted from overcrowding, including understaffing, insufficient clinical space, and inadequate medical and mental health resources.[122] Manifestations of these inadequacies included preventable deaths from illness and suicide, unsanitary clinic conditions, excessive use of segregation, cramped reception areas, and unsafe living conditions.[123] Even though a prison population reduction would not entirely eradicate the negative consequences of overcrowding, the Court recognized that overpopulation was still a primary cause of the Eighth Amendment

STRATEGIC PLAN ON SUICIDE PREVENTION: EVERY CALIFORNIAN IS PART OF THE SOLUTION 17 (June 2008), *available at* http://www.dmh.ca.gov/prop_63/MHSA/Prevention_and_Early_Intervention/docs/SuicidePreventionCommittee/FINAL_CalSPSP_V9.pdf (stating that in 2008, suicide was the third leading cause of death in California's prisons).

115. *Brown*, 131 S. Ct at 1925.

116. *Id.* at 1925–26.

117. *Id.* at 1930–44. *See infra* Part I.C (providing background on PLRA).

118. *Brown*, 131 S. Ct at 1930–32.

119. *Id.* at 1931. The Court concluded that less intrusive relief included the appointment of the Special Master and the Receiver. *Id.*

120. *See id.* at 1931 (clarifying that more time to remedy inhumane conditions will not be allotted if it results in the needless postponement of an effective remedy and the prolonging of unconstitutional prison conditions).

121. *Id.* at 1932–37.

122. *Id.* at 1935. *See* Panel Report, *supra* note 4, at *58–99.

123. *Brown*, 131 S. Ct. at 1933–35. The Court also noted that some prisons contained backlogs of approximately 700 prisoners waiting to see a doctor. *Id.* at 1933.

violations given its inhibiting effect on prison administration.[124]

The Court next focused on whether an alternative remedy could alleviate the constitutional violations, ultimately finding that nothing short of releasing prisoners would suffice.[125] Although the Court deemed some State-proposed alternatives reasonable in theory—such as construction of new facilities and inmate transfers—the Court also determined that California did not have the financial means to fund these programs to the extent necessary to remedy overcrowding within the mandated timeframe.[126] The Court attributed this forecasted outcome to California's struggling economic landscape and observed failures of similar propositions in the past, which, when left unfulfilled, led to persistent unconstitutional conditions.[127] In sum, the Court affirmed that a reduction in California's inmate population was necessary to improve the prison healthcare system, and clear and convincing evidence showed that no other remedy would be effective.[128]

Lastly, the Court found that the panel's prisoner release order was narrowly drawn and prescribed the least intrusive remedy possible.[129]

124. *Id.* at 1936. The Court cited to expert and witness reports as affirmation of the causal connection between overcrowding and unconstitutional prison conditions. *Id.* at 1935. For example, the Court provided testimony from Dr. Craig Haney, a professor of psychology, who stated that mental health personnel in CDCR facilities were "managing far larger caseloads than is appropriate or effective." *Id.* at 1932. In regards to medical care, the Court referenced Dr. Ronald Shansky, former medical director of the Illinois prison system, stating that the "demand for care . . . continues to overwhelm the resources available." *Id.* at 1932–33.

125. *Id.* at 1937–38 (discussing the inadequacy of State-proposed alternatives). *See also* Brief of *Plata* Appellees at 43–44, Brown v. Plata, 131 S. Ct. 1910 (2011) (No. 09-1233) (noting that California had ample opportunity to improve its prisons' medical systems but completely failed to do so). The Court emphasized that numerous experts had maintained that overcrowding was a primary cause of the Eighth Amendment violations. *Brown*, 131 S. Ct. at 1934.

126. *Brown*, 131 S. Ct. at 1937–39. Because California's jails are also filled to capacity, the proposed in-state transfers would seemingly redistribute the problem, not solve it. *See* Panel Report, *supra* note 4, at *101 (noting that thirty-two of California's county jails were under some type of court-ordered population cap, and others had inmate populations close to or above their design capacity). *See also infra* Part IV.B (arguing that transfer processes, referred to as "realignment," are not sufficient remedies).

127. *Brown*, 131 S. Ct. at 1939. The State urged that other remedial mechanisms, such as new facilities construction and additional staff, were effective alternatives. *Id.* at 1937. In considering the State's proposal that it could transfer inmates out-of-state, the Court responded:

> 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. . . . [T]he State has made no effort to show that it has the resources and the capacity to transfer significantly larger numbers of prisoners . . . .

Id. at 1938.

128. *Id.* at 1939 ("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.").

129. *Id.* at 1939–44.

The Court noted that even though the reduction in California's prison population would likely take the form of releasing offenders without mental or medical illness, the order would inevitably lessen the strain on prison resources.[130] Thus, the population decrease would in turn directly improve *all* prisoners' access to healthcare.[131] The Court explained that the 137.5% target figure was narrowly drawn based on expert testimony that purported this number to be effective in facilitating proper prison administration and alleviating unconstitutional overcrowding conditions.[132]

In responding to the challenge that the release of prisoners would threaten public safety and was, therefore, an overbroad remedy, the Court asserted that the State would have discretion to implement reforms in such a way that would mitigate adverse safety consequences.[133] Additionally, the Court maintained that, because overcrowding leads to inmate unrest and higher recidivism, depopulation would likely have the effect of lowering recidivism rates, which in turn would substantially offset any negative impact on civilians resulting from the sizeable release of prisoners.[134] The Court referred to other states, such as Wisconsin, Illinois, and Montana, that reduced prison populations—without increasing crime rates or adversely affecting public safety—through early release programs targeting low-risk offenders.[135]

130. Therefore, the Court determined that even though the order would not have the effect of releasing members of the plaintiff class, overall access to healthcare would improve as a result of increased administrative capacity. *Id.* at 1939–41.

131. *See id.* (noting the potential for prisoners not involved in the litigation to fall victim to the failing medical system at some point in the future).

132. *Id.* at 1942–43. *See* Brief of *Plata* Appellees, *supra* note 125, at 43–44 (noting that the 137.5% figure was reached as a middle ground between evidence that called for a higher cap of 145% and evidence that recommended a design capacity of 130%). The Court made clear, however, that "[t]here is no requirement that every facility comply with the 137.5% limit." *Brown*, 131 S. Ct. at 1941. Assuming no constitutional violations occurred, the Court would allow facilities to retain populations in excess of the limit, provided that other facilities would fall sufficiently below it so the system as a whole remained in compliance with the 137.5% cap. *Id.*

133. *Brown*, 131 S. Ct. at 1941–44.

134. *Id.* at 1941–43. The Court found that various available methods of reducing overcrowding—such as good-time credits allowing the State to administer early release to only those prisoners who pose the least risk of reoffending, or diversion of low-risk offenders to community programs and day reporting centers—would have minimal or no impact on public safety. *Id.* at 1943.

135. *Id.* at 1942. This finding was based on the panel's report, which also discussed how these early release programs reduced recidivism and were often accompanied by community-based support services. Panel Report, *supra* note 4, at *132–33.

D. Dissenting Opinions of Justice Scalia and Justice Alito

Justice Scalia, joined by Justice Thomas, dissented in *Brown*, claiming that the Court affirmed "what is perhaps the most radical injunction issued by a court in the nation's history."[136] Justice Scalia attacked the majority's view that the plaintiffs' allegations rose to the level of systematic unconstitutionality for which a system-wide remedy was appropriate.[137] He asserted that only those individuals who were personally denied adequate healthcare possessed a sufficient basis to allege Eighth Amendment violations.[138] Because the prisoner release order would benefit inmates who did not form part of the aggrieved class, Justice Scalia found that it did not have the narrowly tailored effect required by PLRA.[139]

Justice Scalia also opined that the imposition of such a drastic measure was well beyond the scope of judicial power.[140] Scalia contended that the injunctive measures issued by the district court were more characteristic of executive authority: "[W]hen the injunction undertakes to restructure a social institution, assessing the factual consequences of the injunction is necessarily the sort of predictive

136. *Brown*, 131 S. Ct. at 1950 (Scalia, J., dissenting). Justice Scalia commented that the majority's holding was an "outrageous result" and that the Court disregarded "stringently drawn provisions of the governing statute, and traditional constitutional limitations upon the power of a federal judge, in order to uphold the absurd." *Id.* at 1950–51. *See also* Brief of Appellants, *supra* note 109, at 50 ("Here, the state and local interests are at their zenith: 'It is difficult to imagine an activity in which the State has a stronger interest . . . than the administration of its prisons'" (quoting Preiser v. Rodriguez, 411 U.S. 475, 491–92 (1973))).

137. *Brown*, 131 S. Ct. at 1952 (Scalia, J., dissenting).

138. *Id.* at 1951–52. Justice Scalia stated that there are only two instances in which a class of plaintiffs can assert a claim of systemic unconstitutionally: (1) When the class as a whole suffered a system-wide constitutional violation; and (2) When every individual class member suffered a constitutional violation resulting from a poorly run prison. *Id.* at 1952. Justice Scalia noted that in *Brown*, neither of these theories could justify a prisoner release order because the order would affect individuals who did not experience a constitutional violation. *Id.* He specifically contended:

> It is . . . worth noting the peculiarity that the vast majority of inmates most generously rewarded by the 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.

Id. at 1952–53.

139. *Id.* at 1952. *See also* Blessing v. Freestone, 520 U.S. 329, 340 (1997) (holding that a plaintiff seeking redress under 42 U.S.C. § 1983 must "assert the violation of a federal right, not merely a violation of federal law").

140. *See Brown*, 131 S. Ct. at 1954 (Scalia, J., dissenting) ("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 view—the sort of predictions regularly made by legislators and executive officials, but inappropriate for the Third Branch.").

judgment that our system of government allocates to other government officials."[141]

Justice Alito, joined by Chief Justice Roberts, wrote a separate dissenting opinion in which he suggested that the data the Receiver and Special Master collected was outdated.[142] He urged that overcrowding was not as dire as it had been when the data was collected.[143] Furthermore, Justice Alito stated that the recent decrease in California's violent crime directly corresponded to increased incarceration, and that these statistics supported his view that a prisoner release order was inherently dangerous for society.[144] Justice Alito concluded by expressing concern for the safety of California's residents: "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."[145]

III. ANALYSIS

In assessing the *Brown* Court's decision, it is vital to consider the California Legislature's contributing role in the State's prison overcrowding crisis. The Legislature's failure to effectively respond to prison overcrowding led to persistent and severe constitutional violations, which ultimately created a situation that required judicial intervention. Similarly, the Court's analysis and application of PLRA in *Brown* was crucial to prevent prisoner release orders from becoming unattainable in situations where overcrowding causes Eighth Amendment violations. While the Court-imposed prisoner release order was a necessary step after more than a decade of litigation, it was also one of last resort. California was, and still is, faced with the challenge of digging itself out of an administrative mess due to its use of reactive measures to correct the shortcomings of its corrections system.

141. *Id.* at 1954–55.

142. *Id.* at 1960–62 (Alito, J., dissenting).

143. *Id.* Justice Alito stated that, in order to constitute an Eighth Amendment violation, plaintiffs must show continuous and current constitutional violations. *Id.* at 1962. Justice Alito noted that the evidence used by the Supreme Court and the lower court to justify its findings occurred several years prior to the *Brown* Court's decision. *Id.* at 1961–62.

144. *Id.* at 1966–67. Justice Alito stated that the decrease in violent crime was due at least in part to longer prison sentences, and releasing prisoners would likely have an opposite effect. *Id. But see generally* Emily G. Owens, *More Time, Less Crime? Estimating the Incapacitative Effect of Sentence Enhancements*, 52 J.L. & ECON. 551 (2009) (asserting that longer prison sentences unlikely correlate to decreases in violent crime, where the adverse effects of longer, harsher sentences include: (1) the imposition of substantial costs on society; (2) the creation of social stigmas faced by released prisoners; and (3) increased risk of infectious diseases to incarcerated individuals).

145. *Brown*, 131 S. Ct. at 1968 (Alito, J., dissenting).

This Part analyzes the Court's holding in *Brown*. First, this Part discusses the Legislature's failure to respond to the prison overcrowding crisis and why judicial intervention was necessary. This Part then addresses the Court's determination that overcrowding was a primary causal factor of the Eighth Amendment violations. Next, this Part discusses the *Brown* Court's application of PLRA in finding that a prisoner release order was necessary to remedy the Eighth Amendment violations that persisted for decades due in part to legislative inaction. Lastly, this Part addresses the public and dissenting Justices' concerns regarding *Brown*'s order to release convicted criminals, why this view is misplaced, and why prolonged incarceration may not be the most effective solution for reducing crime.

A. The Severe Constitutional Violations Necessitated Judicial Intervention

After nearly twelve years—a reasonable, if not ample amount of time to complete remedial efforts—unconstitutional confinement conditions in CDCR facilities persisted.[146] California's legislative branch failed to remedy the longstanding violations even after the appointments of the Special Master and Receiver.[147] For example, California claimed it could, and would, construct enough new prison facilities to remedy overcrowding. After over a decade, however, the State had yet to advance construction plans, or expand existing infrastructure, to the degree to which it pledged.[148]

146. *See supra* notes 89–91 and accompanying text (discussing the *Coleman* court's finding that over a decade had passed, and still the unconstitutional conditions persisted). The State argued that the clock measuring "reasonable time to comply" should restart with each new remedial order. S*ee* Brief of Appellants, *supra* note 109, at 22–24. This reasoning is illogical seeing that the remedial process could continue indefinitely. *See Brown*, 131 S. Ct. at 1938–39 (rebutting the State's argument that continued efforts by the Receiver and Special Master would be successful, and finding that "[n]othing in the long history of the *Coleman* and *Plata* actions demonstrates any real possibility" that resources would be made available to support State-proposed alternatives to the prisoner release order).

147. *See infra* Part II.A (discussing the lower courts' findings that necessary improvements in prison administration were not made, the remedial efforts were still seriously lacking, and a prisoner release order was necessary). The State urged that other remedial mechanisms, such as constructing additional prisoner facilities, inmate transfers, and hiring additional staff, were effective alternatives. *Brown*, 131 S. Ct. at 1937. Even the Special Master and Receiver indicated that any advances that had been, or would be made, were quickly quashed by significant increases in the prison system's population. *Id.* at 1931–32.

148. *See Brown*, 131 S. Ct. at 1938 ("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."). Further, in considering the State's proposal that it could transfer inmates to out-of-state prisons, the Court responded: "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 . . . ." *Id.*

Furthermore, harsh sentencing and correctional policies remain intact today, and public support for them continues unabated.[149] This trend reflects the traditional two-fold hurdle legislators face in enacting corrections reforms. First, due to the public's "tough on crime" mentality, any legislator openly in favor of shorter sentencing will likely face public backlash.[150] Second, given state budget deficits, the public will be apprehensive of any political officer who endorses increased corrections spending, even if it is geared toward effective rehabilitation programs or improving harsh prison conditions.[151] Because the California Legislature was not sufficiently responding to the prison overcrowding crisis, judicial intervention in *Brown* was necessary.[152] The Court's willingness to uphold the order was also consistent with its increased hands-on approach to Eighth Amendment challenges in the prison context.

1. Primary Causal Factor

California's sentencing and correctional policies, when combined with a dwindling state budget and an inability to expand or improve facilities, significantly contributed to overcrowding in its prisons.[153] In

149. *See supra* notes 27–28 and accompanying text (suggesting that public opinion pushing for "tough on crime" tactics sustains high prison populations).

150. Solomon Moore, *Study Shows High Cost of Criminal Corrections*, N.Y. TIMES, Mar. 3, 2009, at A13.

151. *See supra* note 17 and accompanying text (noting that taxpayers want their money spent on other budget items instead of corrections). *But see* Randal C. Archibold, *Driven to the Financial Brink, A State Opens the Prison Doors*, N.Y. TIMES, Mar. 24, 2010, at A14 ("[T]he prison population [is] a major drag on the state's crippled finances . . . . [Eleven] percent of the state budget, or roughly $8 billion, goes to the penal system, putting it ahead of expenditures like higher education . . . ."). Public perspective on correctional reform is ironic given that certain reforms, such as shorter sentencing combined with an emphasis on rehabilitation, result in an overall decrease in spending and have proven more effective. *See infra* notes 198, 203, 262 and accompanying text (noting that these methods are more effective and save states between $20,000 and $30,000 annually per offender).

152. *See* Michael B. Farrell, *Schwarzenegger: Riot 'Terrible Symptom' of Crowded Prisons*, CHRISTIAN SCI. MONITOR (Aug. 19, 2009), http://www.csmonitor.com/USA/Politics/2009/0819/schwarzenegger-riot-terrible-symptom-of-crowded-prisons (stating that despite pressure from courts, prisoner rights advocates, and former Governor Schwarzenegger's proposals to scale back prison populations, such reforms have been unwelcomingly received by Republican "allies" in the California Legislature). It is important to recognize that California urged the Court to consider recent reductions it had made in prison populations since the Court granted certiorari. Brief of Appellants, *supra* note 109, at 42. However, the plaintiffs emphasized the lower court's finding that waiting longer before convening the panel "would serve no purpose." Brief of *Plata* Appellees, *supra* note 125, at 33.

153. *See* Claire Suddath, *Spotlight: California's Budget Crisis*, TIME (July 27, 2009), http://www.time.com/time/magazine/article/0,9171,1910985,00.html (noting California's severe budget deficit of over $25 billion). A primary budgetary pressure is the increasing costs associated with the California Correctional Peace Officers Association (CCPOA), CDCR officials' union. CDCR

turn, overcrowding led to inhumane prison conditions and increased inmate pain, death, and suicide rates—the severity of which was clearly articulated in *Brown*.[154]

The Court, while recognizing that a reduction in the prison population would not alone solve the problems exposed in *Brown*, reasoned that the overall effect of a reduction would rectify Eighth Amendment violations in California's prisons.[155] It cited substantial evidence from experts stating that overcrowding directly resulted in insufficient staffing levels, inadequate screening and assessment techniques, unsanitary conditions, and several other factors that contributed to a reduction in prisoners' mental and medical well-being.[156] Indeed, these experts, including the Special Master and Receiver, testified that overcrowding *was* the problem.[157] In fact, even the State recognized overcrowding as a causal factor in *Brown*—a fact further evidenced by Governor Schwarzenegger's public statements regarding the overcrowding epidemic in California's prisons.[158]

The Court correctly found that reducing prison populations would

is one of largest civil employers due to the significant rise in inmate populations. *See* Petersilia, *supra* note 22, at 224; CAL. BUDGET PROJECT, PROFESSORS AND PRISON GUARDS: AN OVERVIEW OF CALIFORNIA'S STATE WORKFORCE 1 (Apr. 2010) (finding that in 2010, CDCR grew four times the rate of other state employers). As of 2006, a correctional officer in California earned on average $73,248 per year. Petersilia, *supra* note 22, at 225.

154. *See Brown*, 131 S. Ct. at 1924–25 (noting that the suicide rate was approximately one per week, suicidal inmates were held in telephone-booth sized cages for extended periods of time due to a shortage of treatment beds, and 72.1% of suicides were "most probably foreseeable and/or preventable").

155. *See infra* Part II.C (detailing the Court's application of PLRA's primary cause requirement).

156. *Brown*, 131 S. Ct. at 1932–34. The Court noted evidence that overcrowding leads to staff shortages and delays in medical and mental healthcare, creates unsafe and unsanitary living conditions, and causes the spread of infectious disease. *Id.* The opinion also quoted the former Executive Director of the Texas Department of Criminal Justice, who stated: "Everything revolves around overcrowding" and "overcrowding is the primary cause of the medical and mental health care violations." *Id.* at 1934. *See also* Haney, *supra* note 39, at 266 ("[T]he most important factor that helps to explain the current crisis in American corrections—a crisis that includes a lack of effective programming and treatment, the persistence of dangerous and deprived conditions of confinement, and the widespread use of forceful, extreme, and potentially damaging techniques of institutional control (such as those used in supermax facilities)—is the overcrowding that has plagued our state and federal prison systems for most of the last thirty years." (footnote omitted)).

157. Panel Report, *supra* note 4, at *58–60. *See infra* Part III.A.1–2 (discussing the lower court's consideration of the Special Master and Receiver's findings).

158. *See supra* notes 98–99 and accompanying text (providing a statement from Governor Schwarzenegger's proclamation on prison overcrowding). *See also* Mark Martin, *Prisons in Crisis, Governor Declares*, S.F. CHRON., June 27, 2006, at A1 (reporting that Governor Schwarzenegger "declared California's prison system dangerously overcrowded" and ordered a special legislative session to enact proposals to remedy the situation).

have an overall positive impact on the availability and delivery of healthcare services, which in turn would address CDCR's systematic Eighth Amendment violations.[159] Reducing the prison population would decrease the number of inmates in need of care and consequently place less strain on CDCR's thinly distributed resources.[160] This depopulation would ultimately have the effect of improving access to healthcare.[161] The reduction would also make facilities less chaotic, thereby facilitating prison officials' ability to maintain order, enhance security, and remove roadblocks to timely treatment.[162] The overall improvement in prison management would ultimately increase retention of competent staff and reduce medical personnel vacancies.[163]

2. Prisoner Release Orders Are Not Unattainable under PLRA

One of the Court's crucial responsibilities is to ensure that constitutional violations of any nature do not continue unaddressed.[164] Even Congress cannot place limits on this supervisory role—a role that supersedes a state's claim of administrative authority.[165] In looking at the State's objections, as well as the public safety concerns surrounding *Brown*'s order, it is vital to keep in mind that these matters were balanced against fundamental constitutional rights. PLRA allows the judicial branch to become involved when legislative measures consistently prove ineffective.[166] If Congress intended to eliminate prison population caps altogether, it would have likely indicated this sentiment through more definitive statutory language.[167]

159. *See supra* Part II.C (discussing the Court's finding that a reduction in overcrowding would systematically improve facility conditions).

160. *See supra* Part II.C.

161. *See supra* Part II.C.

162. *See infra* Part III.B (discussing systematic strains that resulted from prison overcrowding).

163. *See infra* Part III.B (discussing the panel's finding that a reduction in overcrowding would systematically improve conditions of confinement).

164. *See supra* Part I.B (discussing the Court's departure from its "hands-off" approach with respect to Eighth Amendment claims).

165. *See, e.g.*, Brown v. Plata, 131 S. Ct. 1910, 1928–29 (2011) ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration."). *Cf.* Webster v. Doe, 486 U.S. 592, 603 (1988) (finding that significant constitutional questions would arise where a federal statute was construed to "deny any judicial forum for a colorable constitutional claim").

166. *See supra* Part I.C (discussing PLRA's provisions). *See also* Sercye, *supra* note 25, at 481 ("Federal courts have long recognized that [prison] population reduction orders may sometimes be necessary to ensure constitutional prison conditions.").

167. In *Connecticut National Bank v. Germain*, the Court asserted: "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." 503 U.S. 249, 253–54 (1992). *See* 18 U.S.C. § 3626(a)(3) (2006) (indicating no use of the term "only"). "Where Congress includes particular language in one

While the *Brown* dissenting opinions criticized the use of a system-wide remedy, the Court has generally recognized that such remedies are appropriate where enough instances of actual or imminent harm are apparent due to an overall deficient system.[168] For example, in *Columbus Board of Education v. Penick*, the Court found a system-wide remedy appropriate where a school board's unconstitutional desegregation plan had a significant widespread segregative impact.[169] Moreover, the Court in *Helling v. McKinney* noted that even the possibility of future constitutional violations in a prison context provides a basis for system-wide relief.[170]

The *Brown* Court, in assessing whether the prisoner release order was narrowly tailored under PLRA's framework, properly emphasized that the focus should not be placed on whether every inmate suffered a constitutional violation, but instead on whether a court's authority allows for system-wide injunctive relief.[171] In this instance, the Court affirmed its authority to take action where serious adverse consequences threaten the entire inmate population.[172] Additionally, in addressing PLRA in the context of a prison population cap, which in this instance was unmatched in scale, the Court's statutory interpretation set necessary precedent enabling courts to take extensive remedial action in situations where the legislature is unsuccessful or unresponsive.[173]

section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Gozlon-Peretz v. United States, 498 U.S. 395, 404–05 (1991) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

168. *See* Lewis v. Casey, 518 U.S. 343, 348–49 (1996) (recognizing that inmates who can provide enough instances of actual or imminent injury can establish a claim that requires a system-wide remedy). *Cf.* Smith v. Ark. Dep't of Corr., 103 F.3d 637, 646 (8th Cir. 1996) ("[I]n the conditions-of-confinement challenge of the case before us, [Plaintiff] and all the inmates living in the same room are similarly subjected to the same unconstitutional condition, and no individual remedy will be adequate unless it eliminates the unconstitutional condition in the barracks as a whole, which necessarily benefits all the inmates residing there.").

169. 443 U.S. 449, 465–68 (1979).

170. *See* Helling v. McKinney, 509 U.S. 25, 33 (1993) ("That the Eighth Amendment protects against future harm to inmates is not a novel proposition."). *See also* Youngberg v. Romeo, 457 U.S. 307, 315–16 (1982) (stating that it is "cruel and unusual punishment to hold convicted criminals in unsafe conditions").

171. *See Substantive Rights Retained by Prisoners*, *supra* note 56, at 964 (asserting that the subjective component of the Eighth Amendment framework does not require a prisoner seeking a remedy for unsafe conditions to await a tragic event before obtaining relief). *See also* Sercye, *supra* note 25, at 477 (describing this approach as the "need-narrow-intrusiveness" standard, which is "best understood as being composed of two elements: scope of relief and form of relief").

172. Brown v. Plata, 131 S. Ct. 1910, 1947 (2011).

173. *See supra* notes 106–07 and accompanying text (highlighting the deference given to the State in complying with the prisoner release order).

Although Congress intended for PLRA to curtail frivolous prisoner suits, this statute does not proscribe inmates from bringing claims all together (surely such a law would be unconstitutional).[174] On the one hand, the Court had not previously analyzed PLRA's prison population cap requirements before *Brown*, and thus, it was unclear how liberally the Court would issue a population cap. On the other hand, if *Brown*, which addressed the most severely overcrowded prison system in the U.S., did not present a factual pattern that triggered a population cap under PLRA, such a context may not exist.[175] As the Court noted: "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."[176] Not only was judicial intervention necessary, but the system-wide remedy was urgent to prevent serious bodily harm and death.

B. Discretion Given to the State

Although the State, as well as Justice Alito in dissent, urged that the court order constituted unnecessary judicial interference in corrections administration—an area Alito stressed is better left to state control[177]—the order provided "ample flexibility" for California to repair its overpopulated prison system.[178] The *Brown* Court gave California seemingly free rein to administer remedies it deemed most effective and to tailor these remedies specifically to each CDCR facility.[179] In the majority opinion, Justice Kennedy emphasized that California had the option to build more prisons, hire additional staff, or transfer its inmates

174. *See* Ruiz v. Estelle, 161 F.3d 814, 817 (5th Cir. 1998) ("PLRA narrowly limits the relief a federal court may order in prisoner suits."), *cert. denied*, 526 U.S. 1158 (1999). *See also* Brief *Amici Curiae* of the American Civil Liberties Union et al. at 6, Brown v. Plata, 131 S. Ct. 1910 (2011) (No. 09-1233) [hereinafter *Amici Curiae* ACLU]. The legislative intent behind PLRA was not to make release orders unattainable in cases where ongoing and undisputed constitutional violations existed, but to address the problem of population caps being imposed in the absence of any finding of a constitutional violation. *Id.*

175. *See* Shay & Kalb, *supra* note 48, at 319–21 (explaining that some view PLRA as effectively allowing abuses in U.S. prisons and jails to persist, which unjustly inhibits prisoners' access to courts).

176. *Brown*, 131 S. Ct. at 1947.

177. *See infra* Part II.D. *See also* Brief of Appellants, *supra* note 109, at 53 (asserting that the order denied the State of "meaningful discretion to manage particular facilities").

178. *See supra* notes 106–07 and accompanying text (explaining the discretion given to the State in complying with the prisoner release order).

179. *Brown*, 131 S. Ct. at 1939–41. The State is free to develop response mechanisms that reflect cost-effective goals, so long as they are constitutional. *Id.*

to out-of-state prisons, private facilities, or county jails.[180] Although Justice Scalia, Justice Alito, and the State consistently referred to the order as a "prisoner release order," it was in essence an order to reduce the prison population in the form of a population cap, and the State had discretion to ultimately reach compliance without releasing a single inmate.[181] In *Castillo v. Cameron County*, for instance, the Fifth Circuit noted that the state of Texas could divert low-risk offenders instead of releasing inmates to relieve overcrowding and comply with its court-mandated cap.[182] The fact that, prior to the court-mandated order, California did not divert low-risk offenders, build more prisons, expand existing prisons, or implement other mechanisms that it claimed would resolve the issue of overcrowding during the first two years post-*Brown* solidifies the Supreme Court's contention that the legislature was consistently making empty promises.[183]

C. Public Safety Concerns

A primary reason for the State and dissenting opinions' opposition to judicial interference, and one from which public concern stemmed, was the order's implications on public safety.[184] As evidence of state and public outcry, former GOP state senator George Runner stated:

180. *Id.* Due to fiscal turmoil, California was not in the financial state to realistically complete these options. *Id.* at 1939.

181. *Id.* *See* 18 U.S.C. § 3626(g)(4) (2006) (defining a "prisoner release order" as a "temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison").

182. 238 F.3d 339, 345 (5th Cir. 2001).

183. *See One Year in, Is California's Plan to Fix Its Prisons Working?*, THE CAL. REP. (Aug. 22, 2012), http://www.californiareport.org/archive/R201208220850/a ("CDCR has not had a history of being able to really marshal the kind of effort that [remedying overcrowding] is going to take . . . ." (quotations omitted)). *See also infra* Part IV.A (discussing California's efforts to remedy overcrowding through realignment mechanisms).

184. *See infra* Part II.D (detailing the dissenting opinions). *See also* Bill Otis, *Take the Kids Inside and Lock the Door*, CRIMEANDCONSEQUENCES.COM (Oct. 8, 2011), http://www.crimeandconsequences.com/crimblog/2011/10/take-the-kids-inside-and-lock-.html ("Plata's legalized jailbreak has begun."); Dahlia Lithwick, *Show, Don't Tell: Do Photographs of California's Overcrowded Prisons Belong in a Supreme Court Decision about Those Prisons?*, SLATE (May 23, 2011), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/05/show_dont_tell.html (questioning the Court's use of photographs to incite public empathy); Bill Mears, *High Court Orders Drastic Prison Population Reduction in California*, CNN (May 24, 2011), http://www.cnn.com/2011/CRIME/05/23/scotus.california.prisons (referring to *Brown*'s ruling as reflecting the "classic battle over state versus federal authority" and "focusing on whether U.S. courts can step in and essentially run state prisons when officials have repeatedly violated basic constitutional guarantees afforded to inmates"); Adam Liptak, *Justices, 5-4, Tell California to Cut Prisoner Population*, N.Y. TIMES, May 23, 2011, at A1 (calling the Court's decision as one that "broke along ideological lines").

> "By flooding our neighborhoods with criminals, the court will make one of the highest taxed states in the nation among the most dangerous as well . . . ." "At a time when law-abiding Californians cannot find jobs, it's hard to imagine how convicted felons will do anything other than return to a life of crime."[185]

Despite the fact that the three-judge panel heard 10 days of trial, considered over 100 exhibits, and dedicated 50 pages of its opinion to the issue of public safety, concern surrounding convicted inmates' potential return to society persisted.[186] The three-judge panel, however, found that California could safely implement a population reduction through effective and reliable methods.[187] As the panel noted, the State's options included: "[E]nhancing good time and program participation credits; diverting technical parole violators and certain offenders with short sentences; reducing the length of parole supervision; implementing evidence-based rehabilitative programming; or implementing sentencing reforms . . . ."

The panel based its public safety findings on numerous expert testimonies and empirical evidence from other states.[188] For instance, in considering the effectiveness of early release programs, the panel looked to an expert report that evaluated similar programs in Canada, as well as Washington, Wisconsin, and Colorado (among other U.S. states), over the past twenty years and found that such programs do not endanger public safety.[189] Additionally, the panel noted that Texas recently reduced its prison population by diverting technical parole

185. Patrick McGreevy & Anthony York, *California Scrambles after Supreme Court Orders the Release of Thousands of Inmates*, L.A. TIMES (May 23, 2001), http://latimesblogs.latimes.com/california-politics/2011/05/state-scrambles-to-deal-with-prison-order.html.

186. *See infra* Part II.D (noting Justice Scalia and Justice Alito's concerns regarding public safety). *See also supra* note 187 (exemplifying public outcry against the order).

187. Panel Report, *supra* note 4, at *123. *See infra* Part II.C (discussing the Court's finding that the prisoner release order could be safely implemented). The three-judge panel stated: "[W]e conclude that shortening an inmate's length of stay in prison would not increase recidivism rates, and that shortening the length of stay through earned credits would give inmates incentives to participate in programming designed to lower recidivism." Panel Report, *supra* note 4, at *145. The Court considered statistics indicating that between 1996 and 2006, California had conducted small-scale early release programs in certain counties that did not result in higher crime rates. Brown v. Plata, 131 S. Ct. 1910, 1920 (2011). Evidence also shows that in Los Angeles County, a *decline* in the crime rate followed the release of 56,000 inmates in compliance with a mandatory population cap. CAL. STATE SHERIFFS' ASS'N, JAIL OVERCROWDING: A STATE AND LOCAL CRISIS (2006), *available at* http://www.calsheriffs.org/index.php/resource-center/cssa-library/jail-overcrowding-whitepaper; *Overall Violent Crime Down 13%—Overall Crime Declines in LASD Area*, L.A. CNTY. SHERIFF'S DEP'T, http://sheriff.lacounty.gov/wps/portal/lasd/media/detail/?current=true&urile=wcm:path:/lasd+content/lasd+site/home/home+top+stories/overall+violent+crime+down+13++overall+crime+declines+in+lasd+area (last visited Jan. 22, 2013).

188. Panel Report, *supra* note 4, at *123.

189. *Id.* at *175.

violators and using risk-based guidelines to increase the state's parole grant rate *without* adverse public safety consequences.[190] Furthermore, as discussed in Part IV, diversion and post-release supervision as alternatives to prison are often more effective than incarceration.[191] Moreover, these alternatives are cheaper than imprisonment and thereby preserve resources that states can dedicate to rehabilitation. Because housing an inmate is the most expensive corrections option—approximately $78.95 per day—states are spending more than twenty times what the daily cost of probation would be per offender.[192]

1. Incarceration and Recidivism: The Real Consequences

Brown's holding should serve as a direct challenge to the effectiveness of the nation's current incarceration regime. The following passage poses key questions for legislatures and constituents in the post-*Brown* era:

> "[I]f 'prison works' is the answer, what was the question?" If the question is whether it is possible to prevent individuals from committing crimes by putting them in prison, then prison certainly works . . . . But if the question is what is the best way to reduce crime, "prison works" may not be the most helpful response. Does a five-year prison sentence work better to reduce crime than a two-year prison sentence? . . .
>
> The most salient question of all may be, Do the resources devoted to prison "work" better to ensure public safety than if those resources were devoted to something else? Prisons *are not the only way* to fight crime.[193]

Unquestionably, incarceration prevents individuals from re-offending while imprisoned[194] and arguably deters unlawful conduct.[195] It also

190. *Id.* at *166–67.

191. *See infra* notes 198, 262 and accompanying text (comparing the cost of incarceration and alternative mechanisms). *See generally* THE PEW CTR. ON THE STATES, POLICY FRAMEWORK TO STRENGTHEN COMMUNITY CORRECTIONS, EVIDENCE-BASED PRACTICES 7 (2008), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_correction/PolicyFramework.pdf (finding that the assessment of offender risk associated with good-time credit programs helps to improve prisoner assignments and supervision, and enables staff to better design and tailor rehabilitative programs, which are two key components to reducing recidivism).

192. PEW CENTER, REVOLVING DOOR, *supra* note 13, at 6.

193. DON STEMEN, VERA INST. OF JUSTICE, RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME 16 (2007) (emphasis added) (footnotes omitted).

194. *See* Doug Keller, *Rethinking Illegal Entry and Re-entry*, 44 LOY. U. CHI. L.J. 65, 98 (2012) ("Nevertheless, a sentencing scheme designed to prevent individuals from committing crimes by locking them up for longer periods is bound to be successful in the limited sense in which all incapacitation schemes are successful. As noted criminologist David Patton explained, 'Inmates cannot commit crimes outside of prison while in prison.'" (footnote omitted)).

195. *See id.* at 76–77 (discussing the general deterrence theory). For an overview of the deterrence theories and criminal law, see sources cited in *id.* at 76 n.39.

addresses public sentiment that few costs are too great to protect another individual from falling victim to crime, as well as the belief that those who commit crimes deserve to be punished.[196] However, the more significant inquiry surrounding the effectiveness of "tough on crime" policies is whether incarceration is as effective as other alternatives.[197] Programs that divert individuals from prison and that focus on rehabilitation may be more cost-efficient and more effective at reducing overall crime rates over the long term.[198] By focusing solely on whether and for how long an individual is incarcerated, the "tough on crime" mentality inhibits consideration of additional important factors, including: (1) why the crime was committed in the first place; and (2) how society can prevent first-time and repeat offenses.[199]

While the pain and hardship of incarceration can have a deterrent effect on an individual contemplating crime, incarceration can also socialize convicted persons into further criminal activity.[200] The environment created by severely overcrowded prisons cultivates violence, perpetuates criminal habits, and can lead individuals to re-offend once released. In short, prison can foster a "criminogenic" atmosphere.[201] The current functioning of the prison system also

196. Unfortunately, the cost-benefit analysis of release versus incarceration is not a "conversation society is having." W. David Ball, *Normative Elements of Parole Risk*, 22 STAN. L. & POL'Y REV. 395, 403 (2011). As Ball notes,

> We tend to discuss the crime level as something that should, optimally, be zero . . . . Public safety is not an optional budget item . . . . Each crime committed by a parolee [or an offender released early] is seen as both avoidable and worth avoiding. . . . The problem with this line of thinking is that it avoids the costs of *nonrelease*—the financial and human costs of incarceration—and fails to account for the marginal crime-reduction benefits in sufficient detail.

Id. at 403–04 (emphasis added).

197. *See* Keller, *supra* note 194, at 76 ("Criminologists have [long] chronicled the struggle of criminal law to deter conduct.").

198. Compare the cost of housing a prisoner, which (according to a poll of thirty-three states in 2009) is approximately $29,000, to the cost of supervising an offender in the community through parole and probations, which ranges from $1,250 to $2,750 annually. PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 12 (Mar. 2009), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf. Therefore, the cost to house and manage inmates is twenty-two times more per day compared to supervising offenders in the community. *Id.*

199. *See generally* DAVID M. KENNEDY, DETERRENCE AND CRIME PREVENTION: RECONSIDERING THE PROSPECT OF SANCTION (2012) (evaluating the deterrence component of criminal punishment and how it relates to crime prevention).

200. *See* Dan Harris, *Prison Violence Can Heighten Public Danger*, ABC NEWS (June 7, 2006), http://abcnews.go.com/GMA/LegalCenter/story?id=2048040&page=1 (analogizing the release of inmates from the current prison system to putting a pit bull in a cage, poking him with a stick, and subsequently letting him out in a classroom of students).

201. *See* Fan, *supra* note 43, at 595 ("[P]risons may exert a criminogenic effect, brutalizing the inmate further, facilitating the creation of a criminal network, providing an education in

results in many instances of violence among incarcerated individuals—the inhumane, crowded, and understaffed prisons lead to unattended fights, suicide, and gang reprisals.[202] Hence, keeping certain offenders out of prison, shortening unnecessarily lengthy sentences, and emphasizing the development of rehabilitation programs can ultimately *improve* public safety.[203]

Evidence further suggests that increasing incarceration does not correspond to an equal improvement in public safety. States that have relatively high incarceration rates do not always have corresponding lower recidivism and crime rates.[204] For example, both New York and Florida had prison populations of approximately 70,000 inmates in the early 2000s.[205] Over the ensuing decade, Florida's inmate population increased by 30,000 individuals whereas New York's fell by 10,000.[206] Despite their diverging paths, both states experienced a *similar* drop in crime—in fact, New York's drop was larger.[207] As a possible explanation, experts have recognized that excessive imprisonment of offenders, which results in lacking or nonexistent rehabilitation programs, can have the unintended effect of perpetuating offenders'

criminality, and consolidating a criminal identity.").

202. *See* Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1054–55 (stating that prisons are essentially "schools for criminals," as inmates interact with other criminals and internalize the antisocial norms promulgated by the correctional facilities).

203. *See infra* Part IV.C (detailing proactive reform approaches to corrections and incarceration). *See also* Nancy Vogel, *Rehab in Prisons Can Cut Costs, Report Says*, L.A. TIMES, June 30, 2007, at B1 (noting that if prisons effectively rehabilitated their inmates and capitalized on safe early release methods, the State could save between $561 million and $684 million a year on a reduced inmate population).

204. *See* JENNI GAINSBOROUGH & MARC MAUER, THE SENTENCING PROJECT, DIMINISHING RETURNS: CRIME AND INCARCERATION IN THE 1990S, at 3 (Sept. 2000), *available at* http://www.sentencingproject.org/doc/publications/inc_diminishingreturns.pdf (explaining the diminishing marginal benefit of increased incarceration rates past a certain point).

205. PEW CENTER, REVOLVING DOOR, *supra* note 13, at 5.

206. *Id.*

207. *Id.* Some scholars attribute New York's crime rate drop to New York City's "Broken Windows" approach to crime fighting and its aggressive policing. *See, e.g.*, K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 276 (2009). The Broken Windows theory maintains that "physical and social disorder (broken windows in houses or factories, abandoned lots, begging, loitering, and public drinking or urination) give rise to fear, which leads inhabitants to stay at home and sends a signal to more serious criminals that no one cares about a block or neighborhood," which thereby increases crime. *Id.* New York City's "Zero Tolerance Policing," which emphasizes the prevention of petty offenses with the hope of deterring more serious ones, puts offenders behind bars for longer stretches of time. *Id.* at 276. Nevertheless, while New York has experienced a significant drop in crime since implementing the zero tolerance approach, the evidence is unclear as to how weighty its impact has been on the declining crime rate. *Id.* at 277–78.

criminal habits upon release.[208] California is a prime example: between 2004 and 2007, the rate of recidivism among California's inmates was 57.8%.[209] Compared to three year recidivism rates in other states during the same time period—for example, 31.9% in Texas, 34.8% in Georgia, and 39.1% in Arizona—California's high return-to-prison percentage is striking.[210]

IV. IMPACT

Almost two years after the Supreme Court decided *Brown*, and as the prisoner release order's final benchmark draws near, California is still attempting to reduce its prison population to meet its Court-mandated cap. In 2011, the State instituted a series of programs intended to lower prison populations, including transferring low-risk offenders to county facilities.[211] These methods, however, are reactive and fail to address the underlying issue at hand: how California and other states can prevent prison populations from reaching crisis points again in the future.[212] Whether California's ongoing efforts will succeed at the time of its two-year benchmark remains to be seen. Additionally, whether states will learn from this administrative debacle and instigate proactive reforms to prevent overcrowding and unconstitutional conditions before they occur is an issue of even greater concern.[213]

This Part first enumerates the steps California has taken in its effort to comply with *Brown*'s prisoner release order. This Part then assesses the measured success of these efforts and suggests that reactive measures may not effectively serve as long-term solutions to prison overcrowding. In tandem, this Part discusses proactive measures, including actions taken in Illinois, and addresses why these methods more successfully rehabilitate inmates and thereby reduce recidivism. Finally, this Part notes that as *Brown*'s two-year benchmark approaches, state legislatures should reconsider the cost-effectiveness and social

208. *Amici Curiae* ACLU, *supra* note 174, at 23. For example, between 2008 and 2009, West Virginia's incarceration rate increased by 5.1%, while its crime rate rose simultaneously by 8.3%. *Id.* at 18–19. *See generally* HEATHER C. WEST, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2009, at 1–2 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf (providing a statistical analysis of inmate population fluxes between 2008 and 2009).

209. PEW CENTER, REVOLVING DOOR, *supra* note 13, at 9–10.

210. *Id.* at 9–11.

211. *See* CAL. DEP'T OF CORR. & REHAB., 2011 PUBLIC SAFETY REALIGNMENT (June 15, 2011), *available at* http://www.cdcr.ca.gov/About_CDCR/docs/Realignment-Fact-Sheet.pdf (providing an in-depth description of the bills that have been passed regarding realignment and their intended purposes).

212. *See infra* Part IV.A–B.

213. *See supra* Part IV.C (describing front-end and back-end reforms).

desirability of incarceration. In that regard, *Brown* may ultimately quiet proponents of "tough on crime" policies.[214]

A. Realignment: An Assessment of California's Current Response

California's response to *Brown*'s order took shape through its Public Safety Realignment Plan ("Realignment Plan").[215] The basic goal of the Realignment Plan is to increase the role of county jails in incarceration and post-release supervision in order to effectively "close the revolving door to low-level inmates cycling in and out of state prisons."[216] More specifically, the Realignment Plan aimed to reduce the inmate population to 155% of the prison system's design capacity by June 27, 2012.[217] In order to effectuate this change, the State, in tandem with CDCR, committed to providing additional funding and resources required to house inmates in county jails.[218] This realignment strategy began after Governor Brown signed AB 109 and AB 117 into law on October 1, 2011.[219] Additionally, California voters approved Proposition 30 in November 2012, which created permanent funding to counties cooperating with the Realignment Plan. [220]

214. *See* Senator Jim Webb, *Why We Must Fix Our Prisons*, PARADE (Mar. 29, 2009), http://www.parade.com/news/2009/03/why-we-must-fix-our-prisons.html (finding that fixing prisons will require a "major nationwide recalculation of who goes to prison and for how long"). *See also* Klingele, *supra* note 21, at 469 (noting that with severe budgetary impediments, governments are starting to recognize that increasing prison populations are causing fiscal strain).

215. *AB 109 & AB 117: Public Safety Realignment of 2011*, CAL. DEP'T OF CORR. & REHAB., http://www.cdcr.ca.gov/realignment/docs/AB_109-PowerPoint-Overview.pdf (last visited Jan. 26, 2013) [hereinafter *AB 109 & AB 117*].

216. CAL. DEP'T OF CORR. & REHAB., CORRECTIONS: YEAR AT A GLANCE 5 (2011), *available at* http://www.cdcr.ca.gov/News/docs/2011_Annual_Report_FINAL.pdf [hereinafter CORRECTIONS: YEAR AT A GLANCE]. California's acknowledgement of the "revolving door" ailment was reflected in Governor Brown's statement:

> For too long, the state's prison system has been a revolving door for lower-level offenders and parole violators who are released within months—often before they are even transferred out of a reception center. Cycling these offenders through state prisons wastes money, aggravates crowded conditions, thwarts rehabilitation, and impedes local law enforcement supervision.

Press Release, Governor Edmund G. Brown, Jr., AB 109 Signing Message (April 5, 2011), *available at* http://gov.ca.gov/docs/AB_109_Signing_Message.pdf.

217. CORRECTIONS, YEAR AT A GLANCE, *supra* note 216, at 5.

218. *See* LEGISLATIVE ANALYST'S OFFICE, THE 2012-13 BUDGET: THE 2011 REALIGNMENT OF ADULT OFFENDERS—AN UPDATE (Feb. 22, 2012), *available at* http://www.lao.ca.gov/analysis/2012/crim_justice/2011-realignment-of-adult-offenders-022212.aspx (discussing budget allocation for realignment purposes).

219. *See* A.B. 109, 2011–12 Reg. Sess., ch. 15 (Cal. 2011); A.B. 117, 2011–12 Reg. Sess., ch. 39 (Cal. 2011); CAL. DEP'T OF CORR. & REHAB., FACT SHEET: ACTIONS CDCR HAS TAKEN TO REDUCE OVERCROWDING (Feb. 24, 2012), *available at* http://www.cdcr.ca.gov/News/docs/FS-Actions-ReduceInmatePop.pdf.

220. *The Cornerstone of California's Solution to Reduce Overcrowding, Costs, and*

The Realignment Plan does not provide for inmate transfer in any capacity.[221] Rather, as of October 1, 2011, non-violent and non-sex offenders are now diverted to the county system upon conviction to free up state prison space for all other convicted felons.[222] In addition to serving time in county facilities, low-level offenders also receive parole supervision from county officials and participate in various county community programs upon release.[223]

The short-term effects of California's realignment strategy reflect some progress.[224] Within two months of AB 109 and AB 117's implementation, California's prison population decreased by 7000 inmates.[225] Within six months, the total decrease in California's state prison population reached 11,000.[226] Due to this visible progress, in January 2012, district court Judge Henderson noted the approaching end of California's court-appointed Receivership.[227] As of October 2012, California still has to release approximately 3000 inmates to meet its court-ordered prison capacity.[228]

In addition to the short-term successes of the Realignment Plan, the promised long-term goals of AB 109 and AB 117 are lofty. Most notably, AB 109 promises to save California an estimated $458 million in correction expenses and allow the State to reach complete compliance with the prisoner release order within the mandated two-year time frame.[229] In an October 2012 report, CDCR claimed that its

Recidivism, CDCR, http://www.cdcr.ca.gov/realignment/ (last visited Dec. 18, 2012).

221. *AB 109 & AB 117*, *supra* note 215, at 11.

222. It is notable that there are exceptions to this model. For example, bribing a legislator constitutes an offense that mandates that the sentence be served in prison. *Id.* at 9.

223. *Id.* at 12–14.

224. CORRECTIONS: YEAR AT A GLANCE, *supra* note 216, at 5–9.

225. *Id.* at 6.

226. *Our View: Signs of Progress in State Prisons*, CAL. CORR. PEACE OFFICERS ASS'N, http://www.ccpoa.org/2012/01/our-view-signs-of-progress-in-state-prisons/ (last visited Feb. 10, 2013).

227. However, the ending of the Receivership will likely be a process that occurs over years, rather than months, as federal court supervision cautiously recedes. *See* Chris Megerian, *U.S. Supervision of Inmate Care Retained*, L.A. TIMES, Sept. 6, 2012, at A5 (noting the district court's rejection of the state's request to end the Receivership in the next six months, and that it will require more improvement before dissolving the Receivership); *Officials Seek End to Oversight of Prison Health Care in 30 Days*, CALIFORNIAHEALTHLINE.ORG (May 9, 2012), http://www.californiahealthline.org/articles/2012/5/9/officials-seek-end-to-oversight-of-prison-health-care-in-30-days.aspx (stating that the Receiver, J. Clark Kelso, believes that federal oversight should continue for another year and a half).

228. *Weekly Population Figures*, CDCR.CA.GOV, http://www.cdcr.ca.gov/realignment/ (last visited Dec. 18, 2012).

229. Ryan Gabrielson, *AB 109: County Officials Scrambling to Make Room for New Inmates*, HUFFINGTON POST (June 6, 2011), http://www.huffingtonpost.com/2011/04/06/ab-109-county-officials-s_n_845579.html.

realignment policy would continue to save California an additional $1.5 billion through reduced spending that accompanies declining offender populations.[230] Further, according to CDCR, "[n]o longer needing to construct and operate many new facilities [will allow] the state [to] realize over $3 billion in General Fund savings annually."[231]

Despite its early successes, California's Realignment Plan has engendered notable costs.[232] To begin, very few county facilities have any unused space.[233] According to the Legislative Analyst's Office, over one-third of California's counties were already under court-ordered jail population limits when the State enacted AB 109 and AB 117.[234] Furthermore, many county jails already have a record littered with lax oversight and faulty administration.[235] With an influx of offenders entering the system, experts doubt county officials' abilities to effectively manage its jail population over the long term.[236] AB 109, combined with the fact that jails do not offer the types of amenities found in most prisons because they are built for stays under a year,[237] has a strong potential to merely recycle issues of overcrowding and unconstitutional facility conditions in the county jail system.[238]

230. CAL. DEP'T OF CORR., THE FUTURE OF CALIFORNIA CORRECTIONS: A BLUEPRINT TO SAVE BILLIONS OF DOLLARS, END FEDERAL COURT OVERSIGHT, AND IMPROVE THE PRISON SYSTEM 2, *available at* http://www.cdcr.ca.gov/2012plan/docs/plan/complete.pdf.

231. *Id.* at 15.

232. *See* CORRECTIONS: YEAR AT A GLANCE, *supra* note 216, at 5–9 (highlighting CDCR's recent achievements in reducing the prison population).

233. *See* Harris Kenny & Adams Summers, Brown v. Plata *Ruling Highlights Need for Reform (Not Tax Increases)*, REASON FOUND. (June 2, 2011), http://reason.org/news/show/ca-prison-brown-v-plata (stating that transferring several thousand prisoners is not an easy task—aside from the transfer's huge costs, county prisons simply do not have enough space to accommodate these prisoners without leading to overcrowding of these facilities); Gabrielson, *supra* note 229 ("Few of California's county jails have the luxury of unused space.").

234. Kenny & Summers, *supra* note 233. *See also* Jens Erik Gould, *As California Fights Prison Overcrowding, Some See a Golden Opportunity*, TIME (Sept. 29, 2011), http://www.time.com/time/nation/article/0,8599,2094840,00.html (noting that counties, specifically Los Angeles County, are apprehensive of the Realignment Plan's effect on county inmate populations and the counties' capacity to house them).

235. *See* Gould, *supra* note 234 (discussing the county system's predicted lack of space for the influx in inmate numbers). *See also* Editorial, *Get Ready, California Counties, Here Come the Inmates*, L.A. TIMES (Aug. 30, 2011), http://articles.latimes.com/2011/aug/30/realestate/la-ed-re-entry-20110830 ("Where hopeful reformers see a new smart-on-crime paradigm, L.A. County supervisors sense an all-too-familiar inadequately funded offloading of state problems onto the counties.").

236. *See* Kenny & Summers, *supra* note 233 (describing the challenges county facilities likely will face in supporting an influx of inmates).

237. Norimitsu Onishi, *In California Prison Overhaul, County Jails Face Bigger Load*, N.Y. TIMES, Aug. 5, 2012, at A8.

238. *See supra* note 233 and accompanying text (noting that many county jails are already overcrowded).

B. An Assessment of other Reactive Measures

States across the country have increasingly used reactive remedies as a means to address significant prison overcrowding. As examples of reactive remedies, a national trend toward reliance on interstate transferring and private prison housing has provided a number of states with the ability to limit their in-state populations once they start overreaching capacity.[239] Many of these remedies, however, come with negative consequences.

In 1983, the U.S. Supreme Court in *Olim v. Wakinekona* upheld the practice of transferring prisoners to different states.[240] Many states continue to use interstate transferring in order to reduce overcrowding in their prison systems. For instance, as of 2008, 54% of Hawaii's prison population was serving time in out-of-state prisons.[241] Additionally, in 2009, the Pennsylvania Department of Corrections transferred 2000 prisoners to other states, and the state is continuing to transfer prisoners to out-of-state facilities at high rates.[242] Nevertheless, as the dissenting opinion in *Olim* recognized, state-to-state transferring results in significantly undesirable social and emotional consequences for prisoners, including increased isolation from friends and family members.[243]

Additionally, states have capitalized on the use of private prisons to alleviate state prison numbers.[244] Private prisons have become

239. U.S. DEP'T OF JUSTICE, INTERSTATE TRANSFER OF PRISON INMATES IN THE UNITED STATES 2 (Feb. 2006), *available at* http://static.nicic.gov/Library/021242.pdf (concluding that nearly every state's department of corrections—forty-three of the forty-eight agencies that responded to the survey—had inmates on transferred status at the time of the Department of Justice's survey). *See also* LEGISLATIVE ANALYST'S OFFICE, A STATUS REPORT: REDUCING PRISON OVERCROWDING IN CALIFORNIA 4 (Aug. 2011), *available at* http://www.lao.gov/reports/2011/crim/overcrowding_080511.pdf (noting that in May 2007, the California Legislature revised State law to allow CDCR to involuntary transfer inmates to other states, and that the Legislative Analyst Office recommended that these transfers continue until California alleviates its prison overcrowding crisis).

240. 461 U.S. 238, 239 (1983). *But see* Vitek v. Jones, 445 U.S. 480, 497 (1980) (finding that inmate transfers to mental hospitals implicated a protected liberty interest).

241. DEP'T OF SOCIOLOGY, UNIV. OF HAW. AT MANOA & DEP'T OF THE ATTORNEY GEN. STATE OF HAW., HAWAII'S IMPRISONMENT POLICY AND THE PERFORMANCE OF PAROLEES WHO WERE INCARCERATED IN-STATE AND ON THE MAINLAND 6 (Jan. 2011), *available at* http://ag.hawaii.gov/cpja/files/2013/01/AH-UH-Mainland-Prison-Study-2011.pdf.

242. Natalie Hrubos, *The Answer to Prison Overcrowding Is Not to Ship State Prisoners Out of State*, PHILA. BAR ASS'N (Dec. 22, 2012), http://uponfurtherreview.philadelphiabar.org/page/Article?articleID=66ef846e-554a-4185-be84-fd0a08ce7535. For instance, in 2010, Pennsylvania transferred 160 inmates to an out-of-state prison. *Id.*

243. *Olim*, 461 U.S. at 252–53 (Marshall, J., dissenting). Facing a transfer to a facility distant from one's home would separate the prisoner from social networks, thereby exposing the prisoner to increased isolation and possible mental health issues. *Id.*

244. *See* Marc Lifsher, *Increase in Inmates Opens Door to Private Prisons*, L.A. TIMES, Aug.

increasingly popular in the United States during the past several decades, and states, including California, have contracted with companies to construct and manage private prison facilities.[245] States suffering from prison overcrowding may view this option as an attractive method to reduce overpopulation, especially in light of the fact that private facilities require less governmental oversight.[246] Private prisons can also offer states the opportunity to house prisoners for significantly less money than if the states used government-run facilities. For instance, Louisiana pays private prisons and county jails approximately $24.39 per day for each inmate in their care,[247] less than half of what it costs to incarcerate a prisoner in Louisiana's state-run prison.[248]

While private prison organizations market their services on the premise of improved prison conditions at a lower cost,[249] serious defects exist surrounding this method of incarceration. First, a lack of accountability and transparency can, and has, led to increased abuses in private facilities.[250] Second, many private prisons face allegations of mismanagement and dubious business conduct.[251] Finally, private

24, 2007, at A1 (noting that for decades, private prison company Corrections Corporation of America (CCA) tried to contract with California to build private facilities, and eventually, after securing a contract, it built two private facilities). *See also* CCA LODGINGS: CA, http://www.cca.com/facilities/?state=CA (last visited Nov. 2, 2011) (describing the location of the two California CCA facilities—one in California City and the other in San Diego).

245. *A Brief History of Private Prisons in Immigration Detention*, DETENTION WATCH NETWORK, http://www.detentionwatchnetwork.org/privateprisons_note2 (last visited Nov. 2, 2011) [hereinafter *A Brief History*] (listing the emergence of other private prison organizations, including the GEO Group, Inc. and Management and Training Corporation).

246. Private contractors are exempt from the requirement to comply with the Freedom of Information Act and are protected from litigation from complex contracts. *See The Influence of the Private Prison Industry in Immigration Detention*, DETENTION WATCH NETWORK, http://www.detentionwatchnetwork.org/privateprisons (last visited Nov. 2, 2011) (noting that a lack of transparency and accountability is often present in private prison facilities).

247. *Louisiana's Prisons Sheriffs' Delight: While Local Officials Cash in, Convicts Lose out*, ECONOMIST, June 26, 2012, http://www.economist.com/node/21556929.

248. *Id.*

249. *See, e.g.*, CCA OVERVIEW, http://www.cca.com (last visited Nov. 4, 2012) (describing its company as "protecting public safety, employing the best people in solid careers, rehabilitating inmates, giving back to communities, and bringing innovative security to government corrections—all while consistently saving hardworking taxpayers' dollars").

250. *See* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 441–42 (2005) (noting that because the owners of private correctional facilities are profit seeking, they have greater motivation than their state-run counterparts to reduce spending on meeting inmates' needs). *See, e.g.*, *A Brief History*, *supra* note 245 (noting that in the Idaho "Gladiator School," a prison named for its reputation for violence and run by CCA, a prison surveillance camera showed a man becoming knocked unconscious by another prisoner while the guards calmly stood by).

251. *See, e.g.*, Sarnata Reynolds, *Immigration Detention: The Golden Goose for Private*

prison companies strongly lobby for harsher criminal laws, thereby ironically contributing to the prison overcrowding epidemic that states seek to remedy.[252]

C. A Glance at Proactive Reform

There are two general ways in which states can proactively, instead of reactively, implement prison reform: "front-end" and "back-end" mechanisms.[253] Front-end mechanisms focus on how to keep non-violent, low-risk offenders from entering the prison system, while back-end efforts focus on how to effectively manage the rehabilitation of prior offenders and prevent them from returning to the system.[254] Front-end efforts include the diversion of low risk offenders by increasing reliance on community service sanctions, electronic monitoring, and day reporting centers, while reducing reliance on requirements such as pre-trial detention, three strikes laws, and habitual offender laws.[255] Back-end mechanisms involve parole eligibility, which is commonly affected by truth-in-sentencing laws, sentence or good-time credit programs, and infirmity-based release.[256]

1. Proactive Reforms are More Effective than Reactive Mechanisms

Governor Brown has acknowledged that the improvement in incarceration rates and prison conditions is, and continues to be, largely

Prisons, HUFFINGTON POST (June 20, 2011), http://www.huffingtonpost.com/amnesty-international/private-prisons-immigration_b_875946.html (noting that CCA receives 40% of its business from the federal government, including Immigrations and Customs Enforcement and the Federal Bureau of Prisons (BOP)). Furthermore, CCA and BOP have had a very close relationship, as high-ranked BOP employees have discreetly left BOP and accepted lucrative positions at CCA. *Id.* For example, Michael Quinlan, a former BOP director who left the agency after a sexual harassment scandal, subsequently took a senior position at CCA (where he currently is a senior vice president). *Id.*

252. *See supra* notes 1–6 and accompanying text (describing the inhumane conditions in California prisons as a result of the State's harsh approach to criminal law).

253. ACLU, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES 10–14 (2011), *available at* https://d3h9au4afozpagcloudfront.net/files/assets/smartreformispossible_web.pdf; Klingele, *supra* note 21, at 486.

254. ACLU, SMART REFORM, *supra* note 253, at 10–12; Klingele, *supra* note 21, at 486.

255. ACLU SMART REFORM, *supra* note 253, at 12–14. Diversion of low risk offenders prevents them from entering the system in the first place by placing them in community-based programs, such as drug treatment facilities. *Id.*

256. Klingele, *supra* note 21, at 487–94. Inmates can earn sentence credit by participating in prison programming or by abiding by prison regulations and procedures. *Id.* at 488–89. At least thirty-one states authorize some form of earned release credit. *Id.* For example, some states have increased the amount of credit that prisoners could earn for successfully completing certain programs, while other states have expanded the class of inmates eligible to receive credit. *Id.* at 490–91.

the result of the Supreme Court's order in May 2011.[257] It is clear, however, that California's Realignment Plan, along with possible alternative reactive remedies, is flawed. As previously discussed, using reactive remedies to mitigate prison overcrowding can lead to further human rights abuses.[258] Additionally, the cost of litigation throughout the *Brown* proceedings imposed an extraordinary financial burden upon the State.[259] Thus, one key lesson to glean from *Brown* is that the best way to avoid cleaning up an administrative mess is to prevent one from occurring in the first place.

Generally, it is illogical for states to put themselves in the position where they must determine how to reactively respond to lacking resources and overcrowded facilities.[260] The overall cost-effectiveness of having fewer offenders imprisoned and diverting them into community programs is supported by objective evidence, including the experiences of states that have successfully implemented such reforms.[261] On average, the cost of incarceration is over $20,000 more than monitoring an offender by way of community-based treatment programs.[262]

Going forward, states should use both front-end and back-end means to better achieve prisoner rehabilitation.[263] Using these techniques often allows inmates to remain in their communities and receive more

257. *Our View*, *supra* note 226 (internal quotations omitted).

258. *See infra* Part IV.A–B (discussing the inefficiencies associated with, and concerns surrounding, reactive remedies to prison overcrowding).

259. *See* Margo Schlanger, *The Political Economy of Prison and Jail Litigation*, 18 PRISON LEGAL NEWS 1, 3 (June 2007) (discussing the high cost associated with prisoner litigation).

260. *See infra* Part IV.C.1 (addressing the superiority of proactive reforms over reactive measures).

261. *See* DANIEL F. WILHELM & NICHOLAS R. TURNER, VERA INST. OF JUSTICE, IS THE BUDGET CRISIS CHANGING THE WAY WE LOOK AT SENTENCING AND INCARCERATION? 6 (June 2002) (stating that it is cheaper to educate an inmate than to incarcerate them multiple times over and finding that North Carolina, Virginia, and Kansas are exemplary states that made "far-reaching substantive changes to laws governing sentencing and incarceration in the 1990s"). *See also* Jessica Ramirez, *Get Out of Jail, Free*, NEWSWEEK, Mar. 11, 2009, http://www.thedailybeast.com/newsweek/2009/03/11/get-out-of-jail-free.html (stating that parole and probation are much cheaper alternatives to incarceration).

262. JUSTICE POLICY INST., PRUNING PRISONS: HOW CUTTING CORRECTIONS CAN SAVE MONEY AND PROTECT PUBLIC SAFETY 1 (May 2009), *available at* http://www.justicepolicy.org/images/upload/09_05_REP_PruningPrisons_AC_PS.pdf.

263. *See* JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, VERA INST. OF JUSTICE, CONFRONTING CONFINEMENT 27–29 (June 2006), *available at* http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf (emphasizing the importance of rehabilitation and its positive effect on inmate populations and communities in general). Rehabilitation in a criminal context encompasses a number of features, including drug-treatment, vocational, and training programs designed to reduce recidivism and prepare inmates for re-assimilation. *Amici Curiae* CLEP, *supra* note 20, at 3.

personalized services, while simultaneously allowing prisons to invest saved money into more effective treatment programs.[264] By endorsing rehabilitative services and programming for both inmates and parolees, states can ensure that they are taking steps to reduce recidivism.[265]

The question of whether the *Brown* Court's holding will cause the public's "lock and key" mentality to shift to an endorsement of proactive alternatives to incarceration deserves reflection. At a minimum, it is possible that society will welcome creative and effective ways to reduce crime.[266] As the answers to these questions play out in *Brown*'s wake, it is beneficial to further assess the aforementioned programs that states can implement to prevent crime, particularly a successful rehabilitative model used by the Illinois Department of Corrections.[267]

2. What Does Work? An Example of Proactive Reform in Illinois

The use of proactive corrections reform, specifically rehabilitative measures, is hardly novel.[268] Experts and scholars have been pushing for such reform for years.[269] As states attempt to navigate the most effective ways to implement proactive reforms, it is useful to look at successful alternatives to incarceration. While many states have various diversionary and rehabilitative programs,[270] this Subsection focuses on

264. *See* ACLU SMART REFORM, *supra* note 253, at 9 (stating that "[c]riminal justice policies are more effective when crafted based on criminology or science rather than fear and emotion," and therefore rehabilitation and individual offender assessments are significantly effective).

265. By emphasizing rehabilitation, states can focus more attention on what indicators to look for in assessing recidivist tendencies. *Id.* They can also invest savings into community programs that help reduce recidivism. *Id.* at 14.

266. Mark Sherman, *Calif. Ordered to Cut Its Inmate Population*, MSNBC.COM (May 23, 2011), http://today.msnbc.msn.com/id/43140405/ns/us_news-crime_and_courts/ (noting that *Brown*'s ruling "comes amid efforts in many states, accelerated by budget gaps, to send fewer people to prison in the first place").

267. *See* Klingele, *supra* note 21, at 494 (highlighting that it is too early to determine whether reforms implemented by states will be effective). *See also infra* notes 276–78 (assessing the rehabilitative model used by the Illinois Department of Corrections).

268. *See* Sherman, *supra* note 266 (stating that California's prison administration has been ineffective).

269. *Id.*

270. *See, e.g.*, *Alternative to Incarceration (ATI) Programs*, N.Y. STATE DEP'T OF CRIMINAL JUSTICE SERVS., http://www.criminaljustice.ny.gov/opca/ati_description.htm (last visited Sept. 29, 2012) (listing state-sponsored alternatives to incarceration, including mental illness programs, pretrial services, drug and alcohol programs, and community services programs); *About Cases: Mission*, CASES, http://www.cases.org/about/mission/ (last visited Sept. 19, 2012) (describing the forty years this New York organization has had working with alternative-to-incarceration programs in the state and noting that addressing the root causes of crimes and helping offenders reintegrate into society makes communities safer while saving taxpayer dollars).

successful efforts employed by the Illinois prison system.[271]

Not unique to Illinois, drug offenders are routinely housed alongside those who have committed violent crimes as a result of deficient bed space and poor infrastructural organization in correctional facilities.[272] This setup promotes the criminogenic effect of prisons and significantly contributes to overcrowding in almost every U.S. prison facility.[273] According to the Center for Health and Justice, illegal drug use "has played a fundamental role in the population explosion within the American justice system."[274] To prevent drug offenders from congesting prisons, Illinois implemented one promising front-end proactive measure: diverting drug offenders from the traditional prison system and into tailored treatment plans.[275]

The Sheridan Correctional Center, an Illinois Department of Corrections facility, is a medium security all-male prison that is dedicated entirely to housing individuals dealing with substance abuse.[276] In addition to providing its inmates with rehabilitative services, this facility collaborates with community programs to help reintegrate these individuals into society and ensure they receive assistance upon release.[277] As a result, lower-level offenders who otherwise would have been placed in traditional prison facilities are

271. One effective method of assessing effective reform is by measuring the reduction in overall recidivism rates in the prison system. ACLU SMART REFORM, *supra* note 253, at 14.

272. *See generally* LISA BRAUDE ET AL., CTR. FOR HEALTH AND JUSTICE, NO ENTRY: IMPROVING PUBLIC SAFETY THROUGH COST-EFFECTIVE ALTERNATIVES TO INCARCERATION IN ILLINOIS 9–11 (2007), *available at* http://www.centerforhealthandjustice.org/IllinoisNoEntry_Final.pdf [hereinafter NO ENTRY].

> [C]urrent policies that incarcerate non-violent offenders with substance use disorders, instead of treating their drug problems, only add to the burden of an already overcrowded criminal justice system and unnecessarily cost taxpayers billions of dollars. Accumulated research and experience have shown that supervised substance abuse treatment is a viable alternative to incarceration for non-violent, drug-involved offenders.

Id. at 9.

273. *See supra* notes 200–02 and accompanying text (describing the criminogenic effect prisons can have on inmates).

274. NO ENTRY, *supra* note 272, at 6.

275. *See id.* at 23 (recommending the use of diversionary programs for those with substance abuse disorders rather than allowing them to enter the traditional justice system). *See also infra* notes 281–83 and accompanying text (describing the apparent successes after Illinois opened the Sheridan Correctional Center).

276. *Sheridan Correctional Center*, ILL. DEP'T OF CORR., http://www2.illinois.gov/idoc/facilities/Pages/sheridancorrectionalcenter.aspx (last visited Jan. 26, 2013).

277. *See id.* (noting examples of services, including academic programs, vocational training, drug education, anger management groups, drug and alcohol treatment programs, therapy, parenting classes, veteran groups, Bible study programs, joint programs with clinical reentry management services, and community substance abuse treatment organizations).

separated into this particularized facility based on their needs and provided with services to help prevent them from reoffending.[278]

At first glance, it may appear as though this method is fiscally ineffective. The cost to house these men is significantly higher than in other facilities—Illinois must pay $34,733 per year to house an adult in the Sheridan Correctional Center,[279] while it costs the State $19,492 to house an adult offender in the maximum security Menard Correctional Center.[280] However, enacting proactive reforms, such as the use of treatment centers and drug programs, as an alternative to traditional incarceration will ultimately help end the cycle of recidivism. With more tailored treatment options, individuals can receive the care needed to help resolve the underlying causes of their criminal tendencies.[281] The numbers behind this particular proactive program are telling: individuals treated at the Sheridan Correctional Center are 40% less likely than other Illinois inmates to reoffend one year after their release and 85% less likely to commit another crime in their lifetime.[282] This downturn in recidivism will in turn reduce the fiscal cost of housing these individuals in the future and the social cost of allowing individuals who are not sufficiently rehabilitated to reenter society.[283]

Although Illinois and other states have started to implement proactive reforms to counter prison overcrowding, public support is still needed if such programs are to achieve long-term success.[284] Convincing the rest of society that an emphasis on rehabilitation rather than harsh corrections and sentencing policies is more effective will not be easy. The past few decades have shown that an uphill battle lies ahead.[285]

278. *Id.* *See also* Robert Weiner & Daphne Baille, *Drug Treatment an Alternative to Prison*, CHI. SUN TIMES, Oct. 16, 2010, at 18 (attributing declines in recidivism rates for men treated in the Sheridan Correctional Facility to counseling and job training).

279. *Sheridan Correctional Center*, *supra* note 276.

280. *Menard Correctional Center*, ILL. DEP'T OF CORR., http://www2.illinois.gov/idoc/facilities/Pages/menardcorrectionalcenter.aspx (last visited Sept. 25, 2012).

281. *See generally* OFFICE OF NAT'L DRUG CONTROL POLICY, DRUG COURTS: A SMART APPROACH TO CRIMINAL JUSTICE (May 2011), *available at* http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/drug_courts_fact_sheet_5-31-11.pdf (noting that drug courts, or treatment centers that receive diverted offenders, help treat many of the underlying causes of criminal behavior, in turn reducing recidivism).

282. Weiner & Baille, *supra* note 278.

283. *See supra* notes 264–65 and accompanying text (noting the improvement in public safety when effectively rehabilitating inmates and preventing high levels of recidivism).

284. *See supra* note 149 (discussing the public's perception on crime and its impact on legislative enactment); Klingele, *supra* note 21, at 495 (stating that there are already some indications that the public may not be eager to embrace the newest rounds of early release legislation).

285. *See* Beth Caldwell & Ellen C. Caldwell, *"Superpredators" and "Animals"—Images and California's "Get Tough on Crime" Initiatives*, 2011 J. INST. JUST. INT'L STUD. 61, 61 (arguing

Hopefully, in time, the public's view of corrections will begin to evolve now that states are faced with *Brown*'s ultimatum: release or reform.

CONCLUSION

In the wake of *Brown*, state legislatures and the public must confront the stark reality that inhumane, unconstitutional living conditions in our nation's prisons will not persist without a remedy. Despite California's near-term progress in its realignment efforts, further permanent reform is needed. California and other states must reconsider harsh criminal policies that contribute to excessive incarceration. The "lock the door and throw away the key" mentality has led to overreliance on incarceration, which continues to deplete state resources, perpetuate criminogenic prison environments, and inhibit effective rehabilitation of offenders. *Brown*'s landmark decision should incentivize legislatures to address the causes and implications of excessive incarceration and to implement proactive reform policies, including both front-end and back-end techniques, as opposed to merely relying on reactive measures. In turn, this shift will hopefully enlighten the public to reconsider the current state of corrections and advocate for a more humane, rehabilitative, and cost-effective prison system.

that criminal justice policy has been influenced by popularized misrepresentations of offenders as "superpredators"). Certain reform program features, such as transparency, public accountability, and sustainability help garner public support. Klingele, *supra* note 21, at 515–21.