

Dual Failures: The Role of Race in Eighth Amendment Violations in Prisons

Jason Reed†

“The degree of civilization in a society can be judged by entering its prisons.”

– Fyodor Dostoyevsky

Introduction

The United States is home to 5% of the world’s population, however, it houses nearly one quarter of the world’s prison population.¹ The prison population in the United States has been rising since the early 1970s.² Since 1970, the prison population has increased 500%,³ nearly three times faster than the United States population as a whole.⁴ Some prisons house up to 200% above their intended capacity.⁵ In these facilities, prisoners live in crowded gymnasiums with limited access to sanitation.⁶ Congested gymnasiums are cesspools of infection, and because the prisons are overcrowded, prisoners lack access to reliable healthcare.⁷ The government has a constitutional obligation to provide healthcare to prisoners,⁸ a task that becomes more difficult as each new prisoner is locked away.

The late 1980s and early 1990s were periods of particularly rapid prison expansion.⁹ Shifts in federal and state laws led to

†. J.D. expected 2013, University of Minnesota Law School. I would like to thank the editors and staff of *Law and Inequality* for their work on this article. I am also grateful to Professor Perry Moriearty for her encouragement, advice, and insight. Most importantly, I want to thank my parents and my wife, for their constant support.

1. Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1.

2. MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 3 (2007).

3. *Id.* at 1.

4. *Resident Population Data*, U.S. CENSUS 2010, <http://2010.census.gov/2010census/data/apportionment-pop-text.php> (last visited Sept. 23, 2012). The population in 1970 was 203,211,926 compared to 308,745,538 in 2010 for a growth rate of 150% over the same forty years. *Id.*

5. Brown v. Plata, 131 S. Ct. 1910, 1923 (2011).

6. *Id.* at 1924.

7. *Id.* at 1933.

8. Estelle v. Gamble, 429 U.S. 97, 103 (1976).

9. Press Release, U.S. Dep’t of Justice Bureau of Justice Statistics, State and

soaring incarceration rates.¹⁰ California, the primary focus of this Article, more than doubled its prison population from 1989 to 2008.¹¹ Because California is a bellwether state for criminal policy, an examination of California and its prison population provides insight into every other jurisdiction in the country.¹² Considering that California's prisons were already reaching 200% capacity by 1990, the explosion in California's incarceration rates has led to severe overcrowding in its prison facilities.¹³ Such conditions of confinement often strip prisoners of their dignity as human beings.¹⁴ In *Brown v. Plata*, the Supreme Court addressed what level of dignity the Eighth Amendment guarantees to those in prison.¹⁵ While the criminal justice system may deprive prisoners of their liberty after a criminal conviction, these prisoners still "retain the essence of human dignity inherent in all persons."¹⁶

The United States' current penal system punishes more people for longer periods of time than at any other point in its history.¹⁷ While the justice system has been busy packing prisons, crime, especially violent crime, has been declining since the early 1990s.¹⁸ However, instead of decreasing proportionately, the United States' imprisonment rate continued to rise.¹⁹

The disproportionate effect of United States criminal law on minorities is well documented.²⁰ This disparity is the cause of

Federal Prison Population Tops One Million (Oct. 27, 1994), available at <http://bjs.ojp.usdoj.gov/content/pub/press/PAM94.PR>. The prison population grew by more than 1,500 inmates a week during the first half of 1994 and expanded by 71,000 from October 1993 to October 1994. *Id.*

10. See MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* 26–29 (2011).

11. CAL. DEP'T OF CORR. AND REHAB., *MOVING FORWARD* 5 (2009).

12. Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, 37 *CRIME & JUST.* 207, 210 (2008).

13. See HUMAN RIGHTS WATCH, *PRISON CONDITIONS IN THE UNITED STATES* 34 (1991). In 1991, some California prisons were already approaching 200% capacity. *Id.*

14. See *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011) (depicting the conditions in overcrowded prisons that constitute violations of constitutional rights).

15. *Id.* at 1922.

16. *Id.* at 1928.

17. See U.S. SENTENCING COMM'N, *FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING*, at vii (2006), available at http://www.ussc.gov/booker_report/Booker_Report.pdf (describing the continued increase in sentencing length over the past few years); TONRY, *supra* note 10, at 35 (showing increased incarceration as a whole and disproportionately so towards Black Americans).

18. RYAN KING, MARC MAUER & MALCOM YOUNG, *INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP* 3 (2004).

19. See TONRY, *supra* note 10, at 35.

20. See ASHLEY NELLIS ET AL., *THE SENTENCING PROJECT, REDUCING RACIAL*

another more disturbing problem: the brunt of Eighth Amendment violations is felt disproportionately by minorities.²¹ Many of the same criminal laws and procedures that have caused our prison populations to expand out of control have subjected racial minorities to systematic violations of their Eighth Amendment rights.²²

This Article will examine how the criminal policies of the last few decades have influenced the violation of minorities' Eighth Amendment rights. In Part I, this Article will dissect the "tough on crime" era in which there was a dramatic increase in incarceration rates in the United States.²³ Part II of this Article will explore the unique aspects of California criminal law that led to extended sentences and disproportionate punishment of Black Americans. Part III will look at the federal statutes governing civil rights suits by prisoners. In Part IV, this Article will examine the litigation that led to the court order to release prisoners. Finally, the conclusion of this Article will explore and advocate policy reforms that will decrease both California's prison population and the racial disparity in the state's prisons.

I. The Impact of "Tough On Crime" Rhetoric on Racial Bias and Prison Overcrowding

In 1972, the United States' state prison population was just 174,379, a far cry from the January 2010 number of over 1.4 million.²⁴ The overall rate of imprisonment as of 2006 was 780 per 100,000, nearly five times greater than the 1970 rate of 161 per 100,000.²⁵ Black Americans, however, have fared significantly worse. In 1970, Black imprisonment was 593 per 100,000.²⁶ By 2006, this number had soared to 2,661 per 100,000.²⁷ The percentage of Black Americans in prison approached 50% of the total prison population in the mid-1980s, while Black Americans made up only 12% of the general population.²⁸ The two main

DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 5–7 (Ashley Nellis et al. eds., 2d ed. 2008).

21. See *Plata*, 131 S. Ct. at 1940 (stipulating that California's healthcare failures gave rise to Eighth Amendment violations that were system-wide failures); MAUER & KING, *supra* note 2, at 8 (reporting that California incarcerates Black citizens at a rate 6.5 times higher than Whites).

22. See *Plata*, 131 S. Ct. at 1922.

23. See TONRY, *supra* note 10, at 35.

24. THE PEW CENTER ON THE STATES, PRISON COUNT 2010, at 1 (2010).

25. TONRY, *supra* note 10, at 15.

26. *Id.*

27. *Id.*

28. *Id.* at 27.

drivers of prison population increase were the introduction of mandatory minimum sentencing,²⁹ and changes in law enforcement tied to President Reagan's war on drugs.³⁰ While these nationwide changes played a part in California's prison expansion, three other oddities of the California penal system are responsible for much of the increase in prison population: its decision to relegate sentencing guidelines to the legislature,³¹ California's parole system,³² and its three strikes law.³³ Many other states have adopted similar policies,³⁴ but California's bellwether status helps make sense of national trends.³⁵

"Tough on crime" rhetoric has been a predominant theme in state and national politics over the past few decades.³⁶ The "tough on crime" philosophy led to an era of disproportionate enforcement of drug laws against Black Americans, both in terms of arrests and imprisonment.³⁷ By the early 1990s, state police and federal officers were making 1.2 million drug-related arrests each year.³⁸ Of the drug cases actually prosecuted, over 80% of the defendants were Black males.³⁹ In this time frame there were also many changes to the sentencing guidelines.⁴⁰ The most notorious drug law of the time was the Anti-Drug Abuse Act of 1986.⁴¹ Known as

29. Frank O. Bowman, III, *Debate: How the Supreme Court has Mangled American Sentencing Law and How it Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 368 (2010).

30. See Erika L. Johnson, "A Menace to Society": *The Use of Criminal Profiles and Its Effects on Black Males*, 38 HOW. L.J. 629, 639 (1995) ("In 1982, President Ronald Reagan declared a 'war on drugs' after Americans proclaimed in national polls that drug use was the number one domestic problem.").

31. David Muradyan, *California's Response to Its Prison Overcrowding Crisis*, 39 MCGEORGE L. REV. 482, 485 (2008); see Sara Mayeux, *The Origins of Back-End Sentencing in California: A Dispatch from the Archives*, 22 STAN. L. & POL'Y REV. 529, 530 (2011).

32. Mayeux, *supra* note 31, at 529; Muradyan, *supra* note 31, at 485.

33. CAL. DEPT OF CORR. AND REHAB., *supra* note 11, at 19.

34. See Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 396-97, 400 (1997) (detailing how other states that have adopted multiple offender statutes include Florida, Georgia and West Virginia).

35. Petersilia, *supra* note 12, at 210.

36. See Johnson, *supra* note 30, at 640.

37. TONRY, *supra* note 10, at 27.

38. John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purge, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 568 (1990).

39. *Id.*

40. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, § 217(a), 98 Stat. 2019 (codified as amended at 28 U.S.C. § 994 (1984)).

41. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (amended 2010).

the "100-1" law, it imposed an equal sentence for those possessing 5 grams of crack cocaine as for those possessing 500 grams of powder cocaine.⁴² The United States Sentencing Commission has reported that the people accused of crack cocaine offenses tend to be Black, while most people who are accused of powder cocaine offenses are not Black.⁴³ Black Americans do not use or sell drugs at higher rates than Whites,⁴⁴ yet during the 1980s and 90s Black Americans represented as high as 40% of all drug arrests while composing less than 15% of the population.⁴⁵ The shift in drug policy was coupled with mandatory minimum sentences, many of which were triggered by possessing a specified amount of drugs.⁴⁶ Mandatory minimum sentences increased prison population by lengthening the sentence of conviction on the basis of evidence not necessary for conviction of the underlying crime itself.⁴⁷ The 1986 Act:

[R]equires a five-year mandatory minimum penalty for a first-time trafficking offense involving five grams or more of crack cocaine, or 500 grams or more of powder cocaine, and a ten-year mandatory minimum penalty for a first-time trafficking offense involving 50 grams or more of crack cocaine, or 5,000 grams or more of powder cocaine.⁴⁸

The comparative value between the two substances is eye opening—5 grams of crack had a street value of \$225 to \$750 while 500 grams of powder cocaine would have been worth more than \$32,000.⁴⁹ The law imprisoned low-level drug dealers, predominately Black males, for terms that could be counted not just in years, but in decades.⁵⁰

42. Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. REV. 721, 734 (2003).

43. *Id.*

44. See TONRY, *supra* note 10, at 59–67.

45. See *id.* at 57. Figure 3.1 shows that Blacks comprised over 40% of all drug arrests in 1989. *Id.*

46. Bowman, *supra* note 29, at 377.

An example of this new type of mandatory minimum sentence would be a statute that set the sentencing range for unlawful possession of a controlled substance at zero to ten years, but in a separate provision required that the defendant be sentenced to not less than five years if he possessed a specified quantity of drugs.

Id. See, e.g., 21 U.S.C. § 841(b)(1)(A)(i)-(viii) (1988) (fixing mandatory minimums for drug law violations).

47. See Bowman, *supra* note 29, at 377.

48. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 4–5 (2007).

49. Melissa C. Brown, *Equal Protection in a Mean World: Why Judge Cahill Was Right in United States v. Clary*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 307, 313 (1997). The values are from 1986, the year that the law was passed. *Id.*

50. TONRY, *supra* note 10, at 1.

Another national problem in criminal enforcement has been racial profiling.⁵¹ Profiling by the police is a pervasive difficulty for minorities in the United States.⁵² Racial profiling has long been acknowledged by some in the judiciary,⁵³ even if the ultimate power to curb racial profiling lays in the legislative and the executive branches.⁵⁴ Black Americans are stopped and searched by police at a disproportionately high rate considering the relatively small proportion of the population they comprise.⁵⁵ A study released in 2010 shows that Black youth consume less marijuana than Whites, but are arrested between four to thirteen times more often than Whites for possession.⁵⁶ The government has constructed an average criminal, and that demographic is Black and male.⁵⁷

II. California-specific Factors that Contribute to Racial Bias and Prison Overcrowding

The "tough on crime" movement had a strong impact in California. During this time period, the state made several changes to its criminal laws that led to expanded definitions of crimes and longer sentences.⁵⁸ In 1976, California enacted the Determinate Sentencing Act.⁵⁹ Many state determinate sentencing schemes were enacted as states bought into the national "tough on crime" trend.⁶⁰ The California determinate sentencing structure shifted the control of determining length of sentences to the

51. See DEBORAH RAMIREZ ET AL., U.S. DEPT OF JUSTICE, A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS, PROMISING PRACTICES AND LESSONS LEARNED 3-8 (2000) ("[R]acial profiling is defined as any police-initiated action that relies on the race, ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in a criminal activity.").

52. TONRY, *supra* note 10, at 12.

53. *Commonwealth v. Gonsalves*, 711 N.E.2d 108, 116 (Mass. 1999) (Ireland, J., concurring).

54. See *id.* at 122 (Fried, J., dissenting).

55. See Johnson, *supra* note 30, at 649-51 (1995); see also Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 662 (2002). From January 1995 to June 2000, 40% of all roadside searches in Maryland were of Black citizens, even though they comprised only 28% percent of the state population. *Id.*

56. *Marijuana Profiling; Though They Use Marijuana Less, More Blacks than Whites Are Arrested for It, a New Study Shows*, L.A. TIMES, Oct. 27, 2010, at A18.

57. Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 J. MARSHALL L. REV. 439, 440 (2004).

58. Muradyan, *supra* note 31, at 485.

59. *Id.*

60. *Mistretta v. U.S.*, 488 U.S. 361, 365-67 (1989).

legislature, something that had previously been handled by a parole board.⁶¹ The members of the parole board were insulated from political pressures and could deliberate before releasing guidelines for prisoners.⁶² On the other hand, members of the legislature are up for reelection at regular intervals.⁶³ In California, the legislature has rarely reduced the length of sentences and has frequently increased them.⁶⁴ As one report noted, "between 1984 and 1991, the California Legislature enacted over 1,000 crime bills," with few bills aimed at reducing sentencing.⁶⁵ Constant increases to the length of sentences were accompanied by a nearly 900% increase in the prison population, from 20,000 in 1984 to 173,000 in 2007.⁶⁶

Legislators are not the only public officials who feel pressure to punish criminals. Judges who are elected can face similar political pressures regarding their attitudes towards criminals.⁶⁷ The nature of judicial elections arguably requires judges to appear to be "tough on crime."⁶⁸ Judges' sentences are more punitive the closer they are to judicial elections.⁶⁹ There is also a demonstrated racial skew in the length of sentences, with Whites being sentenced on average thirteen days shorter than non-Whites.⁷⁰ These factors presented a unique problem in California where state judges were allowed to find facts that could then be used to increase a defendant's sentence to the maximum guidelines, even when defendants requested jury trials.⁷¹ The Supreme Court recently struck down this type of judicial fact finding for violating the right to a jury.⁷² Even though the discretion is now gone, judicial discretion played its role in increasing imprisonment rates.⁷³

The sentencing regime in California is closely tied to

61. Muradyan, *supra* note 31, at 485.

62. See Petersilia, *supra* note 12, at 255.

63. See *id.*

64. Muradyan, *supra* note 31, at 485.

65. JOAN PETERSILIA, UNDERSTANDING CALIFORNIA CORRECTIONS 5 (2006).

66. Murdayan, *supra* note 31, at 486.

67. Joanna Cohn Weiss, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. REV. 1101, 1103-04 (2006).

68. *Id.* at 1113-16.

69. Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 255 (2004).

70. *Id.*

71. *Cunningham v. California*, 549 U.S. 270, 271 (2007).

72. *Id.* at 273.

73. Huber & Gordon, *supra* note 69, at 255.

California's parole system; the two have worked in tandem to produce dramatic increases in length of incarceration and prison population.⁷⁴ California's parole system is used more often and fails at a higher rate than the national average.⁷⁵ The California parole system experienced an even more dramatic increase in population than the prison system.⁷⁶ The number of parole violators that returned to prison increased thirty-fold from 1980 to 2000.⁷⁷ Since 1987, parole violators have been the largest group of offenders entering California state prisons, making up nearly two-thirds of the prison admissions in 2005.⁷⁸ Most parolees who return to prison return for technical parole violations, not convictions for new crimes.⁷⁹ The amount of discretion afforded officials in the parole system has eroded over time.⁸⁰ Where discretion has been maintained, Black individuals tend to have their violations sent to the parole board and are recommended to return to prison at a higher rate than non-Blacks.⁸¹ Prisoners in California released on parole experience long cycles, alternating between freedom and prison for parole violations.⁸² When returned to prison, the parole sentence is placed "on hold," lengthening the overall time an individual is in the corrections system.⁸³

74. Petersilia, *supra* note 12, at 254–58.

75. LITTLE HOOVER COMM'N, BACK TO THE COMMUNITY: SAFE & SOUND PAROLE POLICES 1 (2003), available at <http://lhc.ca.gov/lhcdir/172/execsum172.pdf>. Notably California puts 13% more offenders on parole, has to recommit 32% more parolees back to prison than the national average, and its parolees successfully complete parole at a rate half that of the national average. *Id.* The Little Hoover Commission is a state agency whose mandate is the preparation of reports and recommendations regarding the operation and organization of California's state government. See CAL. GOV'T CODE §§ 8501, 8521–22 (West 2009).

76. LITTLE HOOVER COMM'N, *supra* note 75, at 2.

77. *Id.*

78. Mayeux, *supra* note 31, at 529.

79. Ryken Grattet et al., *Parole Violations and Revocations in California: Analysis and Suggestions for Action*, 73 FED. PROBATION 2 (2009). The rate at which people return to prison in California for technical violations is about equal to the rate which people return to prison for all parole violations nationally. *Id.* For a list of rules that parolees must follow in order to avoid violations, see *Parolee Conditions*, CAL. DEPT OF CORR., http://www.cdcr.ca.gov/parole/parolee_conditions/ (last visited Nov. 18, 2012).

80. Grattet, *supra* note 79, at 4.

81. *Id.* at 10.

82. Mayeux, *supra* note 31, at 536.

83. *Id.* There is substantial evidence that the California parole officer's board lobbied the state legislature with the express purpose of making it more difficult for parolees to ever be fully released from parole. *Id.* Thus, just as there is national talk of a "prison industrial complex" in California, there may be a "parole industrial complex." *Id.*

While many factors have affected prison rates in California, none is more well-known than the “three strikes law.”⁸⁴ As of April 2009, almost a quarter of the inmate population in California was incarcerated under the three strikes law.⁸⁵ The average length of a sentence in California is nine years greater as a result of the three strikes law.⁸⁶ Defendants who are convicted of multiple felonies at once may face life imprisonment,⁸⁷ and the felony that triggers a sentence of life in prison is not required to be serious or violent.⁸⁸ Black Americans make up 43% of all individuals sentenced under the law, while making up less than 7% of the state population as a whole.⁸⁹ Indeed, at least in the early years of the three strikes law, Black Americans were recommended for three strikes sentencing six times more often than Whites.⁹⁰ The result of the three strikes law in California has been a dramatic increase in the prison population, the brunt of which has been felt by Black inmates.⁹¹

III. The Prison Litigation Reform Act and Federal Lawsuits Regarding Eighth Amendment Violations

As the prison population rose, so too did the number of suits filed by prisoners.⁹² The Prison Litigation Reform Act (PLRA) was enacted in response to a perceived abuse of the court system by prisoners.⁹³ The PLRA governs when a prisoner may file suit for

84. CAL. PENAL CODE ANN. § 667(b) (West 2009). The law actually has two provisions that increase sentence lengths. *Id.* If a defendant has one prior felony, the length of the sentence for the current sentence is to be doubled; if a defendant has two prior felonies, the sentence is the greater of twenty-five years or triple the length of the sentence for the currently charged crime. *Id.* The provision doubling sentences for one previous conviction is more of a primary driver of overcrowding. See CAL. DEP’T OF CORR., *supra* note 11, at 19 (2009); Vitiello, *supra* note 34, at 395.

85. CAL. STATE AUDITOR, CAL. DEP’T OF CORR. AND REHAB., INMATES SENTENCED UNDER THE THREE STRIKES LAW AND A SMALL NUMBER OF INMATES RECEIVING SPECIALTY HEALTH CARE REPRESENT SIGNIFICANT COSTS 1 (2010).

86. *Id.* at 27.

87. *People v. Fuhrman*, 941 P.2d 1189, 1199 (Cal. 1987) (holding that multiple felony charges in a single trial may count as multiple “strikes” towards a prisoner’s “three strikes” sentencing).

88. See *Ewing v. California*, 538 U.S. 11, 23 (2003).

89. William Claiborne, *Study Finds Disparity in ‘Three Strikes’ Law: Blacks in California Disproportionately Sentenced*, WASH. POST, Mar. 5, 1996, at A3.

90. Mike Males & Dan Macallair, *Striking Out: The Failure of California’s ‘Three Strikes and You’re Out’ Law*, 11 STAN. L. & POL’Y REV. 65, 70 tbl.4 (1999).

91. See Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-Five Years After the Stanford Prison Experiment*, 53 PSYCHOLOGIST 709, 718 (1998).

92. *Woodford v. Ngo*, 548 U.S. 81, 84 (2006).

93. Lynn S. Branham, *The Prison Litigation Reform Act’s Enigmatic Exhaustion Requirement: What it Means and What Congress, Courts and Correctional Officials Can Learn From It*, 86 CORNELL L. REV. 483, 505 (2001);

violation of their constitutional rights.⁹⁴ The law places significant hurdles for prisoners to overcome before filing a suit in federal court.⁹⁵ One of the most significant changes to the PLRA is its exhaustion provision.⁹⁶ While prior federal law had attempted to give prisoners relatively easy access to federal courts,⁹⁷ the PLRA forces prisoners to maneuver through complex administrative procedures internally at prisons before bringing suit.⁹⁸

Even if a prisoner gets into court, there are several intermediate steps before the court may issue a prison release order. The court must first issue an order “for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied”⁹⁹ The defendant of the initial suit must then be given “a reasonable amount of time to comply” with this order.¹⁰⁰ Only after these conditions are met can a Federal judge issue an order to convene a three-judge panel.¹⁰¹ This panel has the power to enter a release order if it is shown by “clear and convincing evidence that—(i) crowding is the *primary* cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right.”¹⁰² The PLRA sets strict guidelines for prospective relief. The changes required that such relief be “narrowly drawn, [extend] no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation”¹⁰³ All of the barriers and roadblocks took their toll quickly, and prisoner civil rights suits dropped nearly 40% in the first four years after the PLRA was passed.¹⁰⁴

Jennifer Winslow, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant to?*, 49 UCLA L. REV. 1655, 1657 (2002).

94. Prison Litigation Reform Act, Pub. L. No. 104-134, §§ 801–10, 110 Stat. 1321, 1321–66 (1996) (codifying prison release orders as a remedy for overcrowding).

95. Branham, *supra* note 93, at 489–98. The law restricts the right to prospective relief, increases barriers to filing *in forma pauperis*, and bars suit for emotional injuries. *Id.*

96. 42 U.S.C. § 1997(e) (1994) (“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.”).

97. Eugene Novikov, *Stacking the Deck: Futility and the Exhaustion Provision of the Prison Litigation Reform Act*, 156 U. PA. L. REV. 817, 819–21 (2008).

98. *Id.* at 818–21.

99. 18 U.S.C.A. § 3626(a)(3)(A)(i) (West 2011).

100. 18 U.S.C.A. § 3626(a)(3)(A)(ii) (West 2011).

101. 18 U.S.C.A. § 3626(a)(3)(B) (West 2011); 28 U.S.C.A. § 2284 (West 2011).

102. 18 U.S.C.A. § 3626(a)(3)(E) (West 2011) (emphasis added).

103. 18 U.S.C.A. § 3626(a)(1)(A) (West 2011).

104. JOHN SCALIA, U.S. DEPT OF JUSTICE PRISONER PETITIONS FILED IN U.S.

IV. Federal Jurisprudence Regarding the Violation of Constitutional Rights in Prisons

A. Failure to Provide Mental Health Care

*Brown v. Plata*¹⁰⁵ is the culmination of seventeen years of litigation stemming from two separate class-action suits: *Coleman v. Wilson*¹⁰⁶ and *Plata v. Schwarzenegger*.¹⁰⁷ In 1990, a class of prisoners with serious mental disorders filed suit alleging a violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment.¹⁰⁸ After a thirty-nine day trial, the Coleman district court found “overwhelming evidence of the systemic failure to deliver necessary care to mentally ill inmates.”¹⁰⁹ Prisons failed to implement necessary suicide prevention procedures “due in large measure to the severe understaffing that exists”¹¹⁰ In 1995, a Special Master was appointed to oversee development and implementation of a remedial plan of action.¹¹¹ Twelve years after his appointment, the Special Master filed a report stating that mental health care in California’s prisons was deteriorating and attributed this deterioration to overcrowding.¹¹² In those twelve years, California prisons added almost 40,000 new prisoners.¹¹³

B. Failure to Provide Adequate Healthcare

In 2001, a second suit, *Plata v. Schwarzenegger*, for Eighth Amendment violations was filed by a class of California prisoners alleging constitutional deficiencies in the level of healthcare provided to prisoners.¹¹⁴ California stipulated to a remedial injunction, which resulted in the district court appointing a receiver.¹¹⁵ The court took note of overcrowding in the state’s

DISTRICT COURTS, 2000, WITH TRENDS 1980-2000, at 1 (2002), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ppfusd00.pdf>.

105. *Brown v. Plata*, 131 S. Ct. 1910, 1934 (2011).

106. *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995) (bringing a claim of serious deficiencies in prison mental health care).

107. *Plata v. Schwarzenegger*, No. C01-1351, 2005 WL 2932253 (N.D. Cal. 2005) (alleging lack of adequate healthcare for prisoners with serious medical conditions).

108. *Coleman*, 912 F. Supp. at 1293.

109. *Id.* at 1316.

110. *Id.* at 1315.

111. *Id.*

112. *Brown*, 131 S. Ct. 1910, 1926 (2011).

113. CAL. DEPT OF CORR. AND REHAB., *supra* note 11, at 5.

114. *Plata v. Schwarzenegger*, No. C01-1351, 2005 WL 2932243 at *1 (N.D. Cal. 2005).

115. *Plata v. Schwarzenegger*, No. C01-1351, 2005 WL 2932253 at *32–34 (N.D. Cal. 2005).

prisons, noting that 350 prisoners had been shoved into a tiny gym stacked on double-bunks.¹¹⁶ The court believed that the “extreme state of overcrowding, and the failures of past administrations to take medical care seriously” warranted the appointment of a receiver.¹¹⁷ The order implied that appointing a receiver was not the most extreme remedy at their disposal.¹¹⁸ The court was perhaps foreshadowing a belief that California’s prison system would be unable to remedy the constitutional crisis that it had on its hands.¹¹⁹

C. *California Reacts*

These federal court rulings got the attention of Californians. In 2006, Governor Schwarzenegger declared a state of emergency in the state prison system, citing “conditions of extreme peril to the safety of persons” housed in state prisons.¹²⁰ The Little Hoover Commission released a scathing report detailing the failures of politicians to get serious about the overcrowding in California prisons.¹²¹ The report articulated specific recommendations about how to get California’s prisons back to constitutionally appropriate levels,¹²² noting that if California failed to take action it would cede control of its prison system to the federal court system.¹²³

D. *Cases Consolidated Under Three-Judge Panel*

In 2007, plaintiffs in each of the Eighth Amendment cases pending in California filed motions for a special three-judge panel

116. *Plata*, 2005 WL 2932243 at *3.

117. *Plata*, 2005 WL 2932253 at *25.

118. *Plata*, 2005 WL 2932243 at *8.

119. Federal courts had intervened with California prison systems several times before. See, e.g., *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2002) (holding that California prisons violated the Americans with Disabilities Act); *Perez v. Tilton*, No. C 05-05241, 2006 WL 2433240 (N.D. Cal. 2006) (ruling that federal prisons are required to provide prisoners with adequate dental care).

120. OFFICE OF THE GOVERNOR PROCLAMATION 4278, PRISON OVERCROWDING STATE OF EMERGENCY PROCLAMATION (Oct. 4, 2006), <http://www.rbg-law.com/wp-content/uploads/P-001-JTE-1.pdf>.

121. LITTLE HOOVER COMM’N, SOLVING CALIFORNIA’S CORRECTION CRISIS: TIME IS RUNNING OUT (2007), available at <http://www.lhc.ca.gov/lhc/185/Report185.pdf>. The report highlights the main political barriers to prison reform. *Id.* at 2. There is no political will to reduce harshness of criminal sentences and no money to build new prisons. See *id.* If the Governor and legislature are unable or unwilling to institute reform, the report recommends handing control of prison reform to politically insulated groups that have as their sole mandate a goal of improving prison conditions in California. *Id.* at 15–16.

122. *Id.* at 31–32.

123. *Id.* at 1.

to be convened.¹²⁴ In 2009, the panel issued an order to reduce California's prison population to 137.5% of their maximum enrollment.¹²⁵ The court found "overwhelmingly persuasive" evidence that the state's failures at providing constitutional levels of healthcare were due to overcrowding in the penitentiaries.¹²⁶ Expert testimony at trial had concluded that "the overcrowding and facility life-safety and hygiene conditions create a public health and life-safety risk to inmates who are housed there."¹²⁷ The opinion by the court pulled no punches in describing the unsanitary conditions experienced by inmates or placing blame for the constitutional failures of California's prison systems.¹²⁸ The judges cited the state's "tough on crime" policies and political unwillingness to address the overcrowding as key drivers of the current crisis.¹²⁹ California appealed the three-judge order,¹³⁰ and in June 2010 the Supreme Court granted certiorari.¹³¹

E. Brown v. Plata: Supreme Court Affirms Findings of Constitutional Violations

The Supreme Court in *Brown v. Plata* reached a 5-4 decision splitting along ideological lines with Justice Kennedy joining the majority.¹³² The Court upheld the prison release order of the three-judge panel,¹³³ and the panel gave California until June 27, 2013 to comply with the release order.¹³⁴ The split between the majority and the dissenters was over the proper interpretation of the PLRA and its application to the Eighth Amendment claims in the federal

124. *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820 at *27 (E.D. Cal. and N.D. Cal. Aug. 4, 2009).

125. *Id.* at *75.

126. *Id.* at *62.

127. *Id.* at *6 (quoting Med. Experts' Report on San Quentin at 13, *Plata v. Schwarzenegger*, 2005 WL 2932253).

128. *Id.* at *1-8 ("The problem of a highly dysfunctional, largely decrepit, overly bureaucratic, and politically driven prison system, which these defendants have inherited from past administrations, is too far gone to be corrected by conventional methods.").

129. *Id.* at *1.

130. Jurisdictional Statement at 1, *Schwarzenegger v. Coleman*, 2010 WL 1506722 (2010) (No. 09-1233).

131. Bob Egelko, *High Court to Rule on State Inmate Reductions*, S.F. CHRON., June 15, 2010, at C2.

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

133. *Id.* at 1923.

134. Carol J. Williams, *State Is Given Strict Deadline to Reduce Prison Population; There Must Be 14,000 Fewer Inmates By the End of the Year and 37,000 Fewer By 2013*, L.A. TIMES, July 1, 2011, at AA4.

district courts.¹³⁵ Regarding the actual amount of harm experienced by the inmates, the majority noted that “society takes from prisoners the means to provide for their own needs A prison’s failure to provide sustenance for inmates ‘may actually produce physical ‘torture or a lingering death.’”¹³⁶ Additionally, the majority accepted the release order as narrowly drawn because, even though the 137.5% cap chosen by the district courts applied to California’s prison system as a whole, the order did not control prisoner treatment beyond the scope of the violation.¹³⁷ Justice Scalia’s dissent focused on the breadth of the injunction, calling it a “structural injunction” which blurs the line between the judiciary and the executive.¹³⁸ Justice Alito and Chief Justice Roberts focused on the perceived risk of releasing 46,000 prisoners.¹³⁹ They argued that such a comprehensive prison release order does not “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief” as required by the PLRA.¹⁴⁰

V. Description of the Gravity of the Problems Created by Prison Overcrowding and Minority Over-Incarceration

Decades of “tough on crime” policies produced incarceration rates that are stunningly racially disproportionate.¹⁴¹ In California, only 6% of the adult population is Black, but almost one third of the state’s prison population is Black.¹⁴² The trend of over-incarcerating minorities and prison overcrowding did not go unnoticed.¹⁴³ There were numerous warnings that the state was over-incarcerating minorities and that the prisons were overcrowded.¹⁴⁴ Particularly after the Receiver and Special Master had been appointed by the district courts, state agencies and the California Department of Corrections attempted to reform the

135. See *Plata*, 131 S. Ct. at 1922–23.

136. *Id.* at 1928.

137. *Id.* at 1939–42.

138. *Id.* at 1952–54.

139. *Id.* at 1965–68.

140. 18 U.S.C.A. § 3626(a)(1)(A) (West 2011); *Plata*, 131 S. Ct. at 1965.

141. TONRY, *supra* note 10, at 28.

142. JOSEPH M. HAYES, PUB. POLICY INST. OF CAL., CALIFORNIA’S CHANGING PRISON POPULATION 2 (2012). In fact, two-thirds of all female inmates and three-quarters of all male inmates in California are racial minorities. *Id.*

143. See LITTLE HOOVER COMM’N, *supra* note 121, at 18. In 1988, California made a bond sale of \$817 million to build new correctional facilities to relieve overcrowding. *Id.* This was six years before the state passed the three strikes law. *Id.*

144. *Id.* at 18–19; Claiborne, *supra* note 89, at A3.

system.¹⁴⁵ In the end, the results of the “tough on crime” movement and the inherently political nature of trying to change our criminal system made reform impossible.¹⁴⁶ As early as 2005, the state acknowledged to the federal court with jurisdiction over the *Plata* case that there was no conceivable way for California to organize the prisons to meet constitutional standards.¹⁴⁷

Reports from the Special Master and the Receiver set a grim picture of the state of California’s prisons. One such report found mental health care wait times up to twelve months.¹⁴⁸ These long waits took their toll. In 2006, the suicide rate in California prisons was 80% higher than the national average for prison suicides.¹⁴⁹ Evidence before the court indicated that physically sick inmates fared no better. “[U]p to 50 sick inmates may be held together in a 12-by-20-foot cage for up to five hours awaiting treatment.”¹⁵⁰ An officer testified that “antibiotic-resistant staph infections spread widely among the prison population and described prisoners ‘bleeding, oozing with pus that is soaking through their clothes when they come in to get the wound covered and treated.’”¹⁵¹ A medical expert described such crowding conditions as “breeding grounds for disease.”¹⁵² In situations like these, where inadequacy is so widespread and prisoners are all equally exposed to infections, a court cannot efficiently determine which specific prisoners experienced violations of their constitutional rights.¹⁵³ At best a court can determine, as they did here, that the rights of the prison population as a whole are violated,¹⁵⁴ and that population is disproportionately made up of minorities.¹⁵⁵

Compounding the underlying constitutional debacle is minorities’ unsatisfactory access to healthcare outside of prison.¹⁵⁶

145. LITTLE HOOVER COMM’N, *supra* note 121, at 6–13.

146. *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820 at *1, (E.D. Cal. and N.D. Cal. Aug. 4, 2009); *see* LITTLE HOOVER COMM’N, *supra* note 121, at 6–13.

147. *Plata v. Schwarzenegger*, No. C01-1351, 2005 WL 2932253 at *1 (N.D. Cal. Oct. 3, 2005).

148. *Brown v. Plata*, 131 S. Ct. 1910, 1924 (2011).

149. *Id.*

150. *Id.* at 1925.

151. *Id.* at 1933 n.7.

152. *Id.* at 1933.

153. *See Plata*, 131 S. Ct. at 1940.

154. *See id.*

155. MAUER & KING, *supra* note 2, at 3.

156. Dep’t of Health & Human Serv. Agency for Healthcare Research & Quality, *Addressing Racial and Ethnic Disparities in Health Care Fact Sheet* (Feb. 2000), <http://www.ahrq.gov/research/disparit.htm>.

Minorities suffer from asthma, heart disease, diabetes, HIV, and many infectious diseases at higher rates than non-minorities.¹⁵⁷ Substandard healthcare for minorities is a problem in and of itself,¹⁵⁸ but when coupled with the disparate impact of our criminal laws, the problem becomes much more serious. For all but the most destitute individuals, healthcare quality decreases upon entering prison.¹⁵⁹ The prison healthcare system is particularly cruel to those who had inadequate healthcare access outside of prison. Diseases that were untreated or undiagnosed on the outside stand little chance of being adequately dealt with inside the prison walls.¹⁶⁰ Minorities in the United States have less opportunity to access quality healthcare and a higher risk of being incarcerated.¹⁶¹ Once they are incarcerated, the chances of them being properly treated are low.¹⁶²

Overcrowding of prisons and over-incarceration of minorities are intimately connected. California's over-incarceration of minorities is an underlying cause of the prisons' constitutional violations. On the date that the prison release order was affirmed by the Supreme Court, there were about 140,000 prisoners in California.¹⁶³ The court order required that number of prisoners be reduced to 110,000.¹⁶⁴ Reducing the number of Black Californians in prison to match their demographics in the state as a whole would result in releasing almost the exact same number of prisoners as the *Plata* order.¹⁶⁵ Because of political pressures,

157. Jan H. Richardus & Anton E. Kunst, *Black-White Differences in Infectious Disease Mortality in the United States*, 91 AM. J. PUB. HEALTH 1251, 1252-53 (2001); Dep't of Health & Human Serv. Agency for Healthcare Research & Quality *supra* note 156; Dep't of Health & Human Serv. Agency for Healthcare Research & Quality, *Diabetes Disparities Among Racial and Ethnic Minorities* (Nov. 2001), <http://www.ahrq.gov/research/diabdisp.htm>.

158. Dep't of Health & Human Serv. Agency for Healthcare Research & Quality, *supra* note 156.

159. See Michele Westhoff et al., *An Examination of Prisoners' Constitutional Right to Healthcare: Theory and Practice*, 20 HEALTH LAW 1, 7-9 (2008) (exploring the paradox that prisoners are the only group with a constitutional right to health care, but that the health care they receive is often quite poor in quality).

160. *Id.*

161. Nancy Neveloff Dubler, *The Collision of Confinement and Care: End-of-Life Care in Prisons and Jails*, 26 J.L. MED. & ETHICS 149, 149 (1998).

162. *Id.*

163. Adam Liptak, *Justices, 5-4 Tell California to Cut Prison Crowding*, N.Y. TIMES, May 24, 2011, at A1.

164. *Id.*

165. See Hayes, *supra* note 142, at 2. Reducing the number of Black prisoners to match state demographics or obeying the court release order would each require a release of about 25% of the state's prison population. *Id.* See also *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) (estimating the court order would require a population reduction between 38,000 and 46,000).

California has been unable to raise money to build new prisons,¹⁶⁶ unable to reduce sentences on many state crimes,¹⁶⁷ and unable to maintain an effective parole system.¹⁶⁸ California spends almost as much on its prisons as it does on its universities,¹⁶⁹ and somehow, when the state was nearly insolvent, politicians could not muster the political will to fix the state's prison system.¹⁷⁰

VI. Possible Solutions to Alleviate These Problems

Solutions to California's overcrowding problem must not focus just on alleviating civil rights violations but on rectifying the disproportionate incarceration of Black Americans as well. Therefore, simply building new prisons or shipping prisoners from one state to another should be ruled out. Both of these "solutions" do nothing to improve racial disparity in prisons.¹⁷¹ Since California's prison crisis took several decades to develop, there has been ample time to examine the laws and policies of the state and appreciate their impact.¹⁷² Because numerous factors contribute to California's current prison crisis, a variety of strategies can be implemented to reduce both population and racial disparity.¹⁷³ The state should consider changes to its three strikes law and parole system. Other states have used "racial impact statements" to monitor racial disparity and make changes to laws when disparity becomes apparent.¹⁷⁴ By carefully considering its options, California can repair the dual failures that their prison system has created, and thereby set an example for the rest of the nation to follow.

A. Prison Release as a Possible Remedy

Before describing how California should fulfill the Court's

166. See *Plata*, 131 S. Ct. at 1939. The Court references the inability of the state to build its way out of the current crisis as a justification for ordering prisoner relief. *Id.*

167. Petersilia, *supra* note 12, at 255.

168. LITTLE HOOVER COMM'N, *supra* note 121, at 22–24.

169. Petersilia, *supra* note 12, at 268.

170. *Id.* at 273.

171. See *Plata*, 131 S. Ct. at 1938. The Court suggested that plans to relocate prisoners out of state had been inadequate to solve the prison overcrowding crisis. *Id.* The Court deemed it unrealistic for California to build itself out of the current prison crisis. *Id.*

172. Petersilia, *supra* note 12, at 207–11.

173. *Plata*, 131 S. Ct. at 1943.

174. Press Release, Office of the Governor & Lieutenant Governor, Governor Culver Signs Minority Impact Statement Bill into Law (Apr. 17, 2008), available at http://www.governor.iowa.gov/news/2008/04/17_2.php.

order, it is important to consider if a release order is an appropriate judicial remedy. As previously noted, both dissenting opinions in *Plata* highlight the public safety concerns of releasing prisoners.¹⁷⁵ Referring to a prior prison release order in Philadelphia, the dissenting Justices expressed apprehension that released prisoners will rein untold chaos in California.¹⁷⁶ However, this position overlooks the fact that 95% of those in prison are eventually released back into society.¹⁷⁷ It strains credulity to allege that California plans to release its most dangerous criminals because of the release order.¹⁷⁸ This argument also overlooks the truth that in California the correctional system places 95% of all prisoners on parole.¹⁷⁹ Most prisoners released on parole return to prison for technical violations.¹⁸⁰ If California switched to an alternative method of sanctions for technical violations, its prisons would have never become so overcrowded to begin with.¹⁸¹ Thus, the dissenters' fears were misplaced; California already releases more prisoners each year than the release order demands.¹⁸²

Another objection raised by the respective dissents was that the three-judge panel and the majority improperly construed the PLRA to justify the release order.¹⁸³ Scalia argues that a prisoner release order should never be issued unless it can be shown that only a release order and no other form of remedy could possibly alleviate violations of a prisoner's constitutional rights.¹⁸⁴ Because the statute requires relief to be "narrowly drawn," the release order should be issued to release only the prisoners who can show that their constitutional rights were violated.¹⁸⁵ In fact, if a prisoner cannot show that his or her rights were violated, he or

175. *Plata*, 131 S. Ct. at 1956–61.

176. *Id.* at 1965–66.

177. Christine M. Hummert, *Middle of the Road Wakefield, Ohio, and Pre-Release Planning for Mentally-Ill Inmates*, 32 J. LEGAL MED. 295, 297 (2011).

178. See *Plata*, 131 S. Ct. at 1957 (Scalia, J., dissenting) (alluding to inevitable murders and other crimes of prisoners to be released).

179. LITTLE HOOVER COMM'N, *supra* note 75, at 1.

180. Grattet, *supra* note 79, at 2–3. Parolees have high parole requirement failure rates, causing them to account for two-thirds of all persons admitted to California prisons. *Id.*

181. See LITTLE HOOVER COMM'N, *supra* note 75, at xii–xv. Nearly 90,000 prisoners are returned each year to prison as a result of technical violations. *Id.* That is more than double the number of new offenders in any given year. *Id.*

182. See *id.* at 12–15.

183. *Plata*, 131 S. Ct. at 1958–68.

184. *Id.* at 1958.

185. *Id.*

she is not released from prison.¹⁸⁶ Alito focused on the statute's requirement that overcrowding be the primary reason for constitutional violations and that no other form of relief be available to alleviate the violations.¹⁸⁷

Justice Scalia's concerns turn the primary foundation of a class action lawsuit on its head.¹⁸⁸ If every individual prisoner was required to meet the requirements of the PLRA, courts would not be able to adequately relieve the majority of the constitutional violations in California prisons.¹⁸⁹ In *Plata*, it was impossible to sort out exactly which prisoners were experiencing de-facto violations of their rights.¹⁹⁰ Wait lists for medical attention were over 700 patients long and prisoners lived in tiny gymnasiums too overcrowded to effectively manage the spread of disease.¹⁹¹ In such conditions, the adequacy of the healthcare provided to each prisoner is connected to the adequacy of the care as a whole.¹⁹² Crowding is evidently the main driver of the constitutional violations to prisoners.¹⁹³ There are only two possible solutions to the crowding problem: building new prisons or setting prisoners free.¹⁹⁴ The Court cannot compel the former,¹⁹⁵ but is given explicit statutory power to order the latter.¹⁹⁶ Therefore, in this situation, the prison release order was the proper judicial remedy.

B. Reform of Three Strikes Laws

The judicial system neither has the power nor the authority to correct all the systemic problems that lead to overcrowding; it

186. *Id.*

187. *Id.* at 1962–64.

188. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (“A class action, no less than traditional joinder . . . merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits.”).

189. See *Plata*, 131 S. Ct. at 1926. The Coleman suit began in 1990 and took over twenty years to obtain a release order. *Id.* During that same time, the California prison system was admitting 38,000 *new* prisoners each year. LITTLE HOOVER COMM’N, *supra* note 75, at xiv. Unless handled together in a class action, it is difficult to see how every prisoner could obtain a remedy to a civil rights violation.

190. *Plata*, 131 S. Ct. at 1939–40.

191. *Id.* at 1933.

192. See *id.* The majority makes it clear that the cramped and confined nature of the prisoners living conditions coupled with inadequate healthcare is of great concern to them. *Id.*

193. *Id.* at 1934.

194. *Id.* at 1931–33.

195. 18 U.S.C.A. § 3626(a)(1)(C) (West 2011).

196. See 18 U.S.C.A. § 3626(a)(3) (West 2011). The statute defines in detail exactly how courts can issue a prison release. *Id.*

can at most issue decisions that invite legislators to begin reform.¹⁹⁷ Both state and federal legislators can institute a wide array of changes to decrease prison crowding and racial disparity. For example, in California, drug-related arrests have been declining since the year 2000.¹⁹⁸ While the decrease in newly admitted inmates will eventually lead to a decrease in imprisonment rates, many inmates sentenced under the three strikes law or the "100-1" law are still serving sentences.¹⁹⁹ The Fair Sentencing Act of 2010 reduced the base charge for possession of crack and will now retroactively apply.²⁰⁰ Consequently, currently incarcerated defendants may appeal their sentences.²⁰¹ California should explore a similar retroactivity for inmates convicted of drug-related offenses under its three strikes law. Allowing three strike convicts to challenge their sentence would decrease racial disparity; at one time nearly half of all those convicted under the three strikes law were Black Americans.²⁰² Many inmates incarcerated under the three strikes law are imprisoned for non-violent offenses, and drug-related offenses make up a significant portion of the three strikes population.²⁰³ Allowing prisoners to appeal their three strikes drug convictions will help reduce incarceration rates and decrease the number of minorities in California's prisons.²⁰⁴

As with most criminal justice reforms, the main obstacle to

197. See Douglas A. Berman, *Foreword: Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 685–86 (2005) (advocating that the *Booker* decision is a judicial invitation to reexamine fundamental aspects of sentencing procedures).

198. Hayes, *supra* note 142, at 2.

199. See Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19, 25 (discussing the increase in the number of prisoners who are serving prison sentences as a result of the "war on drugs"); see also CAL. DEPT OF CORR. AND REHAB, *supra* note 11, at 19 (documenting that more than 40,000 prisoners serving in California prisons were sentenced under the three strikes law).

200. Joshua D. Asher, *Unbinding the Bound: Reframing the Availability of Sentence Modifications for Offenders Who Entered into 11(c)(1)(C) Plea Agreements*, 111 COLUM. L. REV. 1004, 1004 (2011).

201. Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat 2372 (2010); Asher, *supra* note 200, at 1004–05.

202. See Claiborne, *supra* note 89. In 1996, Blacks accounted for 43% of those imprisoned under the three strikes law in California. *Id.*

203. See CAL. DEPT OF CORR. AND REHAB, *supra* note 11, at 19 (commenting on how roughly 8,000 prisoners are incarcerated under the three strikes law for drug related offenses).

204. See Mauer, *supra* note 199, at 26 (asserting that 53% of all persons incarcerated for drug charges are Black Americans); Males, *supra* note 90, at 67 (showing that Black Californians are six times more likely to be recommended for three strikes sentencing than Whites).

allowing prisoners to appeal their sentences will be political.²⁰⁵ However, studies have shown that the three strikes law has no deterrent effect.²⁰⁶ Furthermore, Californians themselves took significant steps to curb the impact of the three strike law by passing Proposition 36.²⁰⁷ Allowing prisoners to appeal their three strikes sentences will take political capital to succeed, but the Supreme Court's opinion may have created a political climate where this change is possible.

Another important reason to be wary about lengthy sentences is that most people tend to "age out" of being criminals.²⁰⁸ For three strike offenders, life imprisonment incapacitates them well past the age where they are likely to be a danger to society.²⁰⁹ Middle-aged individuals are much less likely to return to prison than those in their youth.²¹⁰ On the other hand, a person's health deteriorates with age, and older prisoners require substantially more medical care than younger prisoners do.²¹¹ Aging prisoners that develop serious medical conditions demand a disproportionate share of medical care in prisons.²¹² The average age in California prisons is increasing, and unless something is done to reverse this trend, the average cost of taking care of prisoners will continue to climb.²¹³ A considerable rise in healthcare costs could put California back in a prison crisis situation, even with a decreased prison population.²¹⁴ For these reasons, California should consider decreasing sentences of prisoners that were sentenced according to its three strikes law.

205. See TONRY, *supra* note 10, at 78–79 (describing racist and bipartisan tendencies in federal drug laws).

206. *Id.* at 161.

207. Michael M. O'Hear, *Statutory Interpretation and Direct Democracy: Lessons from the Drug Treatment Initiatives*, 40 HARV. J. ON LEGIS. 281, 290–91 (2003).

208. See Males, *supra* note 90, at 69. After the age of twenty-five, there is a decrease in felony arrests for each successive age group. *Id.* For Black Americans, however, sentencing under the three strikes rule peaks between ages thirty and fifty. *Id.*

209. CAL. DEPT OF CORR. AND REHAB., 2010 ADULT INSTITUTIONS OUTCOME EVALUATION REPORT 16 (2010). Recidivism rates generally decrease with age. *Id.* When comparing those who are under twenty at the time of release to those over fifty-five at the time of release, the decrease in recidivism is nearly 20%. *Id.*

210. *Id.*

211. Petersilia, *supra* note 12, at 240 ("On average, the cost of incarcerating offenders older than age 55 is \$69,000 per year, or three times the roughly \$22,000 national average cost to keep younger, healthier offenders in prison. Most additional costs are related to health care.").

212. *Id.* at 240.

213. *Id.*

214. See *id.* at 240–41.

C. Decreased Use of Imprisonment

A decrease in the use of imprisonment will reduce racial inequality and overcrowding in California's prisons. Alternatives to imprisonment, such as community service, exist.²¹⁵ In exploring these other options, California should also consider applying "good time credit"²¹⁶ to reduce sentence lengths. Many other states allow for good time credit to be applied to house arrest, or a stepped up amount of good time credit when a prisoner completes an educational degree.²¹⁷ California does not offer good time credit for time spent at rehabilitation centers.²¹⁸ In 2008, roughly 26% of all new males and 33% of females were jailed for drug related offenses.²¹⁹ Moving these drug offenders to rehabilitation and then allowing for good time credit would drastically reduce the number of people under the Department of Corrections' supervision.²²⁰

Decreased use of imprisonment is also an effective method of decreasing the severity of the criminal system on minorities. In sheer numerical terms, nothing would decrease the population of Black Americans in prison more effectively than an actual decrease in the use of imprisonment.²²¹ Because the racial disparity in prisons has grown so large, decreasing the disparity between Black and White inmates by 10% would only decrease Black incarceration rates by 0.3%.²²² On the other hand, cutting the use of imprisonment in half would reduce incarceration of Black Californians by 1.33%.²²³ In California, 48% of the prison population are non-violent offenders.²²⁴ Forms of punishment other than incarceration may be better suited for such non-violent offenders.²²⁵ This change all by itself would take the California

215. LITTLE HOOVER COMM'N, *supra* note 121, at 61.

216. *See, e.g.*, IND. CODE § 35-50-6-3.3 (2010). Good time credits accrue if a person "demonstrates a pattern consistent with rehabilitation" or completes various educational degrees. *Id.*

217. *Id.*; Cottingham v. State, 952 N.E.2d 245, 249 (Ind. Ct. App. 2011) (holding that prisoners are entitled to good time credit for home detention).

218. *See* LITTLE HOOVER COMM'N, *supra* note 75, at vii.

219. CAL. DEPT OF CORR. AND REHAB., *supra* note 11, at 16-17.

220. *Cf. id.* (claiming that if all drug offenders were sent to rehabilitation instead of prison under the three strikes law, there would be roughly a 30% decrease in newly admitted prisoners); LITTLE HOOVER COMM'N, *supra* note 75, at vii (allowing these offenders to be treated in rehab and then released on an accelerated good time schedule would decrease the total time and resources the state had to spend on drug offenders).

221. TONRY, *supra* note 10, at 149-51.

222. *Id.*

223. *Id.*

224. LITTLE HOOVER COMM'N, *supra* note 121, at 18.

225. O'Hear, *supra* note 207, at 294-96.

prison population down to 104% of capacity,²²⁶ even lower than the Court-ordered amount.²²⁷ California attempted to radically reduce the number of drug offenders incarcerated when it passed Proposition 36.²²⁸ However, the results have not produced the type of dramatic decrease necessary to avoid Constitutional violations, and the Proposition does not allow for retroactive challenges by those already sentenced under the three strikes law.²²⁹ By reducing the number of people put in prison initially and by applying good time credits to alternative forms of punishment, California can significantly decrease the number of minorities in its prisons.²³⁰

D. Changes to the Parole System

California's parole system is a major contributor to the state's high prison population.²³¹ Parole revocation and recommitting the parolee to jail is much more prevalent in California than elsewhere.²³² The discretionary nature of the parole system has sent Black parolees back to prison at a higher rate than White parolees.²³³ Categorically, 35% of parole violations are for technical violations; two-thirds of such technical violations are for absconding supervision.²³⁴ Thirty-nine percent of all parole violations in California are for minor offenses, usually drug possession or drug use,²³⁵ both of which can result in the parolee being returned to prison.²³⁶

This bleeds into larger problems: the time spent in prison is not being used to prepare inmates for their eventual release, and the communities that receive parolees are not spending resources to help parolees get jobs.²³⁷ Many parolees become homeless²³⁸ and

226. See LITTLE HOOVER COMM'N, *supra* note 121, at 18–19.

227. *Brown v. Plata*, 131 S. Ct. 1910, 1917 (2011) (ordering California to reduce capacity to 137.5%).

228. See O'Hear, *supra* note 207, at 296.

229. *Id.* at 312–15.

230. See LITTLE HOOVER COMM'N, *supra* note 75, at vii.

231. *Id.* at i. The report opens by calling the parole system a billion dollar failure. *Id.*

232. *Id.*

233. Grattet, *supra* note 79, at 9.

234. *Id.* at 5. "Absconding supervision" means missing a parole appointment or forgetting to update the parole officer about the parolee's whereabouts. *Id.*

235. *Id.*

236. *Id.*

237. See LITTLE HOOVER COMM'N, *supra* note 75, at i.

238. Doc Gurley, *More on the Prison/Homeless Churn*, S.F. GATE (Apr. 13, 2011, 6:17 AM), <http://blog.sfgate.com/gurley/2011/04/13/more-on-the-prisonhomeless->

commit technical violations.²³⁹ To actually solve the parole problem, prisoners must be prepared to re-enter the community after their sentence is over.²⁴⁰ Prisons should partner with county jails in communities where a parolee will be released and train the prisoner for a job that will be useful in that community during the final few months of his or her sentence.²⁴¹ Trained prisoners could then be employed by the state and allowed to establish an income stream and permanent residence.²⁴² To reduce parole revocation, the state could develop gradual sanctions for violations of parole.²⁴³ First time parole violators or parole violators that commit victimless crimes could be sentenced to alternative forms of punishment like community service. Another possible remedy is to place the decision of whether to revoke parole with a judge instead of parole officers²⁴⁴ or to waive supervision for certain low-risk offenders without any history of violence.²⁴⁵

The largest hurdle to changing California's parole system is going to be overcoming objections from local communities.²⁴⁶ Truthfully, many parolees are going to be a burden to the community where they wind up, and local cities may have significant reservations about taking ex-prisoners.²⁴⁷ But breaking the current cycle of returning parolees to prison will free up resources to help prepare future prisoners to re-integrate with society.²⁴⁸ If California were to decrease the length of a revocation sentence from an average of 140 days to 100 days in prison, it would save the state \$300 million.²⁴⁹ The state could then direct this money towards communities taking in new prisoners, helping them build housing facilities, increase law enforcement, and provide general funds.²⁵⁰ The money saved by making this single

churn/.

239. See Grattet, *supra* note 79, at 9.

240. LITTLE HOOVER COMM'N, *supra* note 75, at vii, x.

241. See *id.* at ix, x.

242. See CAL. DEPT OF CORR., *supra* note 11, at 24. In recent years California has attempted to bridge this gap, but the results of the effort are yet to be fully understood. See LEGISLATIVE ANALYST'S OFFICE, STATE OF CAL., IMPLEMENTING AB 900'S PRISON CONSTRUCTION AND REHABILITATION INITIATIVES (2009), available at http://www.lao.ca.gov/2009/crim/ab900/ab900_051409.pdf.

243. CAL. DEPT OF CORR., *supra* note 11, at 34.

244. Grattet, *supra* note 79, at 3.

245. LITTLE HOOVER COMM'N, *supra* note 75, at iii. This measure could save the state between \$120 and \$300 million each year. *Id.*

246. See *id.*

247. See *id.*

248. *Id.* at xv.

249. *Id.* at iii.

250. *Id.* at xv.

change in parole would go a long way towards encouraging cities to take in parolees.

E. State Sentencing Commissions and Racial Impact Statements

While the above mentioned reforms will alleviate California's current crisis, the state must fundamentally alter the way it punishes crime to achieve its long-term goals. In the long run, a more deliberative process will serve the state better than the ad hoc process currently used to determine sentencing.²⁵¹ Creating a state sentencing commission and passing a racial impact statement statute will help control the prison population and decrease racial disparity.²⁵² Sentencing commissions will help manage accurate forecasts of the prison population for the long-term, and can make recommendations to the state legislature to alter sentence lengths when population forecasts diverge from the observed prison population.²⁵³ Racial impact statements try to anticipate what the practical outcome will be of changes to criminal laws or sentencing on racial minorities.²⁵⁴ These two work in tandem to adjust and manage sentencing to both reduce the prison population and the racial disparity in prisons.²⁵⁵

Many states today use sentencing commissions as a way to effectively manage their criminal justice program.²⁵⁶ Typically sentencing commissions produce guidelines that will go into effect unless the legislature specifically votes against the proposal.²⁵⁷ This takes the pressure to be "tough on crime" off of the legislature and relies on the difficulty of producing legislation to overturn sentencing guidelines as a way to detach sentencing from political control.²⁵⁸ The sentencing commission then collects data about individual offenders and modifies sentences accordingly.²⁵⁹ If the

251. LITTLE HOOVER COMM'N, *supra* note 121, at 38. The sentencing laws that were put on the books in the 1980s and 1990s now exist because legislative inertia is too great to repeal. *Id.* A permanent commission with the charge of evaluating sentencing laws can be held accountable, where individual legislators may not be. *Id.*

252. Mauer, *supra* note 199 at 19; LITTLE HOOVER COMM'N, *supra* note 121, at 38.

253. LITTLE HOOVER COMM'N, *supra* note 121, at 40.

254. Mauer, *supra* note 199, at 19.

255. *See id.* at 19–23.

256. *Id.* at 35. Twenty-one states, the District of Columbia, and the federal system use sentencing commissions to provide guidelines. *Id.*

257. LITTLE HOOVER COMM'N, *supra* note 121, at 39.

258. *Id.*

259. *See id.* at 41. Such data points include offense type, drug or weapon use,

committee is permanent, it can modify sentences based on new data.²⁶⁰ In many sentencing regimes, judges are allowed to depart or vary from the guidelines based on their discretion as a trial judge or on specific factors in the guidelines.²⁶¹ Appellate review of the sentence can place one more check on the system to make sure that the goals of uniformity and population control are met.²⁶² California could take this one step further and implement the ABA recommendations that sentencing commissions include diversion programs for less serious offenses.²⁶³ California prisons are filled with low-level offenders, so the practical effects of such a plan would be tremendous.²⁶⁴ Up until now, this idea has been politically unfeasible, but putting the decision in the hands of a sentencing commission may increase the likelihood of implementation.²⁶⁵

The work of the sentencing commission could be bolstered by the use of a racial impact statement.²⁶⁶ Racial impact statements reflect two general values: decreasing the disparate impact of criminal laws on minorities and keeping the public safe.²⁶⁷ Sentencing policies that produce unwanted racial disparities also fail to keep the public safe.²⁶⁸ The goal of the statement is to force law makers and members of the sentencing committee to think proactively about the possible racial effects of laws and guidelines

treatment ordered, prior criminal history, and recidivism. *Id.*

260. *Id.* at 40. North Carolina and Virginia have especially effective sentencing commissions, in part, because of their longstanding effort to continually improve their guidelines. *Id.*

261. LITTLE HOOVER COMM'N, *supra* note 121, at 39.

262. *Id.*

263. JUSTICE KENNEDY COMM'N, AM. BAR ASS'N, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 30-32 (2004).

264. LITTLE HOOVER COMM'N, *supra* note 121, at 18 (finding that over 80,000 inmates in California are in prison for non-violent crimes).

265. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 718 (2005). In theory, a commission can provide political cover for difficult decisions. *Id.*

266. Mauer, *supra* note 199, at 45.

267. *Id.* at 33.

268. *Id.* at 33-34. Mauer quotes the United States Sentencing Commission:

[T]he federal crack cocaine penalties have resulted in thousands of prosecutions of lower-level African-American defendants, yet have produced no demonstrable effects on substance abuse or sales. As noted by the United States Sentencing Commission, an analysis of cocaine price trends appears inconsistent with a finding that federal cocaine penalties established under the 1986 Act and incorporated into the guidelines have had a deterrent effect on cocaine trafficking, and that it is unlikely that the federal cocaine sentencing policy had a significant deterrent effect on users.

Id. (citation omitted) (internal quotation marks omitted).

that are being made.²⁶⁹ In theory, multiple agencies and departments could help prepare racial impact statements, such as the department of corrections and the state treasury department.²⁷⁰ Utilizing multiple state agencies to analyze the racial effect of laws reflects the truth that the disparate impact of criminal laws on minorities is a multifactor problem that no one branch of the government can solve on its own.²⁷¹

By doing proactive analysis of racial disparity, legislators and sentencing commission members can honestly answer the questions, “[D]o the crime control benefits of such a policy outweigh the consequences of heightened racial disparity? . . . [A]re there alternative policy choices that could address the problem at hand without such negative effects?”²⁷² Policy makers are then equipped with a range of options to consider.²⁷³ By equipping policy makers with choices, California can discern at the time of initial legislative votes the impact of laws on minorities, rather than waiting years to learn the answer.

Racial impact statements are still a young idea. Few states have debated their usefulness and fewer have actually implemented them.²⁷⁴ Politicians are hesitant to accept the use of racial impact statements because they will “inject race” into policy considerations.²⁷⁵ Supporters point out that the statements are just uncovering truths about our criminal justice system.²⁷⁶ A separate consideration of impact statements is their price to the state; requiring state agencies to produce a report will come at a cost. Because so few states have implemented impact statements, cost figures are not yet available. However, running a corrections system is expensive; the California Corrections and Rehabilitation

269. *Id.* at 33.

270. *Id.* at 34–37. The broader the input by various agencies, the more types of policy options can be presented to policy makers. *Id.* at 37–41. Currently only Iowa and Connecticut use racial impact statements. Minnesota Second Chance Coalition, Racial Impact Statements, http://www.mnsecondchancecoalition.org/pdf/racial_impact.pdf (last visited Nov. 12, 2012). Illinois, Texas, and Oregon are considering legislation. *Id.*

271. Mauer, *supra* note 199, at 20–28. The article discusses several factors that play into racial injustice in the criminal system such as legislative, enforcement, sentencing, and processing issues. *Id.*

272. *Id.* at 41.

273. *Id.*

274. Minnesota Second Chance Coalition, *supra* note 270.

275. Mauer, *supra* note 199, at 45.

276. *Id.* Racial impact statements have support from groups such as The Sentencing Project and the American Bar Association’s Justice Kennedy Commission. *Id.* Support is also offered by sentencing scholar Michael Tonry. See TONRY, *supra* note 10, at 24.

budget for 2011–2012 is over \$9 billion.²⁷⁷ Compared to this figure, the cost of producing racial impact statements will be minimal. The savings that the statements can produce by analyzing upfront the effect of laws on the incarceration of minorities will assuredly outweigh the cost of their production.

Conclusion

The Supreme Court's prison release order in *Brown v. Plata* is another reminder of the damage that has been done by the "tough on crime" movement. In the decades since this country's policy makers became obsessed with that slogan, prison populations soared while the level of care in these facilities declined.²⁷⁸ Minorities, particularly Black Americans, have borne a disproportionate weight of the "tough on crime" policies.²⁷⁹ *Brown v. Plata* focuses attention on the horrors that have been happening in California prisons, horrors which have disproportionately impacted minorities. These human rights violations would likely never have occurred if "tough on crime" policies had been controlled in California.²⁸⁰

In reducing its prison population, California should pay special attention to fixing the racial injustice that its criminal system has allowed. Therefore, relocating prisoners to other states or building new prisons are unacceptable options. Instead, the state should focus on releasing low-level offenders and reforming its criminal justice structure. Allowing prisoners to appeal their three strikes convictions and fixing the parole system will help to reduce the prison population and decrease racial disparity.²⁸¹ Parole reform will have a significant impact on controlling prison populations and racial disparities in the long run as well. Moving from imprisonment to alternative forms of punishment is the best way to decrease the number of minorities in prison.²⁸² Finally, creating a sentencing commission and charging it and other state agencies with creating racial impact statements will create a permanent focus on population control and racial disparity. Such a focus will hopefully avoid ever placing the state or its prisoners

277. See, e.g., CALIFORNIA DEPT OF CORR. AND REHAB., CORRECTIONS AND REHABILITATION 2 (2011).

278. Petersilia, *supra* note 12, at 207; see also HUMAN RIGHTS WATCH, *supra* note 13.

279. TONRY, *supra* note 10, at 28–29.

280. Petersilia, *supra* note 12, at 210–11; see also HUMAN RIGHTS WATCH, *supra* note 13.

281. Vitiello, *supra* note 34, at 456–57; Grattet, *supra* note 79, at 5–10.

282. Grattet, *supra* note 79, at 5–10.

in a similar situation again. California's problems are large and multifaceted, but if California can come through this difficult time and institute real reform, the state could become a beacon, not of shame, but of hope.

